UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 18 Cr. 0036(JPO)

DAVID MIDDENDORF and JEFFREY WADA,

Defendants.

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March 8, 2019
9:38 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

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- also present -

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Luke Urbanczyk, Government Paralegal
Nathaniel Cooney, Government Paralegal
Kiezia Girard-Lawrence, Postal Inspector
Stephanie O'Connor, Defendant Middendorf paralegal
Sarah Chojecki, Defendant Wada paralegal

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(Jury not present)

THE COURT: Good morning.

ALL COUNSEL: Good morning, your Honor.

THE COURT: Before we begin, I received a letter from counsel for Mr. Wada this morning and I wanted to see if the government would like to respond.

MS. KRAMER: Yes, your Honor. Sorry, I am basically losing my voice from yesterday.

So, there is absolutely nothing new that was done in the government's closing argument. First, I want to just point to some things that the defense has long had in its possession. Jeff Wada's cell phone records were produced very early in discovery. Brian Sweet's 3500 material, in particular, the August 15, 2017 interview. In that interview he said that Jeff Wada -- he understood Jeff Wada was the source of the --

THE COURT: Sumitomo.

MS. KRAMER: Of the Sumitomo Credit Suisse tip that the defense is taking issue with from October -- November, 2015.

THE COURT: Am I correct that Mr. Sweet testified to that?

MS. KRAMER: Yes, your Honor.

So, weeks ago Brian Sweet testified to that. And that is on pages 830 through -- it kind of goes into 837 of his direct testimony, where he talks about, on page 830, the old

colleague he was referring to was Cindy Holder who had in turn received a call from Jeff Wada for the October email. On page 834, about the November email, he had gotten that information, he said, from Cindy Holder, who had discussed it with Wada and that she told him the information.

And then on pages 836 and 837, he went on to testify that he sent text messages essentially praising Wada, saying tell Wada we owe him big because of this information. He was cross-examined by counsel for Wada about this issue, really demonstrating that there was absolutely nothing new in the government's closing, on page -- beginning on page 1184 of the trial transcript.

So there is really just nothing new here that was done and --

THE COURT: So I think you have addressed the surprise issue. Would you also like to address the argument that there was a prejudicial variance from the Indictment?

MS. KRAMER: Certainly, your Honor. There just wasn't.

Paragraph 58 of the Indictment makes clear that after leaving the PCAOB for KPMG, Holder remained in frequent contact from Wada, and on several occasions, between August 2015 and March 2016, Wada provided Holder with additional confidential PCAOB information. There are two examples that are provided, one of which is another sort of piece of Japan information from

November 2015, but those are just examples. It's crystal clear that the government charged from the beginning that Wada was providing Holder with information throughout the time period of August 2015 and March 2016.

And on the face of the emails that are at issue, Sweet says that he got this information from an old colleague. And he has consistently testified that, you know, that was his way of securing the source and saying, you know, he was referring to Holder, who had gotten the information from Wada.

There is no variance of the Indictment. What the government put into evidence is perfectly consistent with the allegations of Wada's participation in the conspiracy from 2015, before these emails, all the way through 2017.

THE COURT: They argue that in paragraph 42 there is a reference to direct communications with PCAOB personnel, and example B is this email. So I guess the argument is that led them to believe that the Sumitomo email was in that category, as opposed to the paragraph 58 category.

MS. KRAMER: Well, your Honor, there is certainly no variance or prejudicial variance based on a review of the totality of the language in the Indictment and, also, based on the discovery in the case. So the phone records that the government pointed to in the closing were produced to Wada, I believe -- I have to check -- but I believe in the government's first production of discovery in this case. And I understand

that was just confirmed. The emails -- the Sumitomo emails were similarly produced in discovery very early in the case.

So, there is no variance from the Indictment. And taken as a totality, and also from a review of the discovery in the case, it's also perfectly consistent with what's been known to the defense based on the discovery but also the production of 3500 material.

THE COURT: All right. Do you want to add anything?

MR. WEDDLE: Yes, your Honor, briefly.

I don't think that it's correct to say when the Indictment specifically quotes the two emails at issue that counsel talked about in summation and specifically says that that is either information that Sweet took himself from his time at the PCAOB or information that Sweet learned through direct communications with PCAOB personnel, that allegation cannot be clearer. And I don't think you can counteract that by --

THE COURT: Well, the question is is it prejudicial, then? Given paragraph 58, what prejudice would there be to the defense?

MR. WEDDLE: Because paragraph 58 says there are other examples of communications with Jeff Wada, but paragraph 42 says these emails are not. I mean, I don't think there is any way for the defense to say this generalized description that covers an eight-month period of time, with no specific

examples, trumps the specific, very concrete allegation of the Indictment that this information came directly to Sweet from someone at the PCAOB. That's a very specific, unambiguous allegation of the Indictment. And I don't think that there is any way for the defense to say, well, the Indictment specifically alleges this but we have phone records and a mass of other discovery and we should somehow divine that the government is going to stand up and say the exact opposite of what the Indictment says.

But, your Honor, let me just -- so that's one point. A second point is the prosecutor's argument just now is that we should always have known that the prosecution was going to contend that these two emails, which are quoted specifically in the Indictment and attributed to someone else, are going to be attributed to Jeff Wada because of the discovery in the case. If that's so, then that just demonstrates what we said in our letter, which is that to put that evidence in as a rebuttal case is an example of sandbagging the defense, your Honor. If they intended to prove that, they should have proved it as part of their case.

And, third, your Honor, the main application that we're making here is simply a ruling from your Honor about the scope of rebuttal summation. We haven't talked about 2015 so far in our summation. We don't want to talk about 2015 in our summation. And if we don't talk about 2015 in our summation,

we would like to have an advance ruling from your Honor that the government will not talk about 2015 in its rebuttal summation. If they're going to want to talk about 2015, then we're going to have to cover this.

And I do think that that's prejudicial for the reasons set forth in our letter, but we think it is outside the scope given our current plans for our summation, and they shouldn't be able to sandbag us yet again by covering it in a rebuttal summation if we don't cover it in our summation. And if they are going to cover it in the rebuttal summation, then we will have to cover it.

MS. KRAMER: So there was evidence of this elicited in our direct case, your Honor. Brian Sweet testified about it. There is no sandbagging --

THE COURT: I agree. Under United States v. Dove, 884 F.3d 138, a defendant alleging a variance must establish that the evidence offered at trial differs materially from the evidence alleged in the Indictment.

Viewed as a whole, I don't think this is a material alteration. In any event, it is not a prejudicial variance given that this is information that came out in the government's case. This is from Sweet's testimony. It was in the discovery materials. So, I'm going to deny the request to preclude argument about this in the government's rebuttal. Can we bring in the jury?

(Jury present)

THE COURT: Please be seated.

Good morning, members of the jury.

JURORS: Good morning, your Honor.

THE COURT: We're continuing now with the closing argument on behalf of counsel for Mr. Wada.

Mr. Cook, you may proceed.

MR. COOK: Thank you, your Honor.

Good morning, ladies and gentlemen.

Yesterday I focused on how the government failed to prove that Mr. Wada was the source of the 2016 and 2017 inspection lists. During the prosecutor's summation yesterday, the prosecutor accused Mr. Wada of sharing confidential information in 2015.

Now, Count Three of the Indictment is the wire fraud charge relating to 2015. Mr. Wada is not charged in that count. However, the prosecutor did allege that Mr. Wada had shared information on two occasions in the fall of 2015 with Cynthia Holder.

What did she say? Well, the government theory as to what happens falls into a similar pattern to what we talked about yesterday: An accusation by Brian Sweet that Mr. Wada was the source and that he is receiving that information from Cindy Holder and that he relays that information up the chain within KPMG. Then the government takes that allegation by

Mr. Sweet and then takes records, phone records and text messages, and tries to construct a story around that to support the allegation that Mr. Sweet passed along.

Now, the theory is for Mr. Wada is that -- well, let's keep in mind that in 2015 there is no evidence that he was upset with his job at PCAOB, and there is no evidence of him having any desire to go work at KPMG. So the theory, the motive, apparently is that he's joining a criminal conspiracy in 2015 because at some point in the future, years in the future, he might want a job at KPMG. That's the theory.

Now, the prosecutor told you -- well, she showed you Government's Exhibit 824. Let's take a look at that.

From October 20, 2015, this is an email from Brian Sweet to a group of people at KPMG. And he says, "I got a call from an old colleague over the weekend and they let me know a decision has been made to inspect a 'big Bank' in both Switzerland and Japan next year (so obviously Credit Suisse and Sumitomo)."

It is important to remember exactly what Brian Sweet is passing along. "A decision has been made to inspect a big bank in both Switzerland and Japan next year." Both Switzerland and Japan, that will become important in just a few minutes and we will come back to that.

Who was the old colleague that Mr. Sweet was referring to? He told us. "I was referring to Cindy Holder who had, in

turn, received a call from Jeff Wada." And that language probably seems familiar because over and over again during Mr. Sweet's testimony, whenever he was asked about where he received information, it came from Cindy Holder. He would always add to it he received it from Jeff Wada, as if he were there, as if he had personal knowledge of that, but we know that he didn't, as if almost he had been trained to say that.

So Sweet makes the accusation and then the government points to these records to support it. This is a phone call on October 17th, three days before the email is sent, in which Cindy Holder and Jeff Wada speak for about an hour. That, ladies and gentlemen, was referred to by the prosecutor as "crushing evidence" that Jeff Wada was the source of that information three days later that Brian Sweet passed along. "Crushing evidence." Because they spoke for an hour. And then three days later Brian Sweet shared the information.

What is the connection between those two event? Well, there is no evidence of that -- of any connection between the phone call between Jeff Wada and Cindy Holder and Brian Sweet's email three days later. But the prosecutor emphasized that it was 63 minutes, an hour-long phone call, that must mean something nefarious was happening. Well, the information that was supposedly passed along would take no more than 20 seconds to convey. So the fact that they spoke for an hour is really of no evidence that anything bad or improper was going on.

So what did they go to next? That was it for the October call. Now we move to November. And we have another email from Brian Sweet to a group of KPMG employees. And here he says, "The PCAOB has decided to move up its inspection of KPMG Japan forward to January 2016 (they just notified the firm). As a result of this timing, I've been told the PCAOB has decided not to look at a bank in Japan. Instead they are replacing it with a bank in Germany (so it looks like Deutche in lieu of Sumitomo)."

What was the support for the accusation by Brian Sweet that that information came from Mr. Wada?

"Cindy Holder" -- this is Brian Sweet.

"Cindy Holder had discussed that directly with Jeff Wada and then had, in turn, told me that information."

That is familiar language that Cindy Holder told me and she got it from Jeff Wada, as if he was party to that conversation.

What's the evidence that it came from Jeff Wada besides Mr. Sweet's testimony? Again, they point to a phone call, 14-minute phone call, on November 9, 2015. It says nothing about what was discussed. It says nothing about whether there was any communication between Holder and Sweet afterwards. It says nothing about who else Sweet was talking to that day or in the preceding days.

Now, one thing that the prosecutor didn't show you,

that I'm going to tell you about, is a series of text messages between Jeff Wada and Cindy Holder. And it's Government's Exhibit 1410. And I imagine the prosecutor in rebuttal will show it to you. I urge you to read every word of it. Because what you will see in there is a conversation between Jeff Wada and Cindy Holder in which she makes statements about how nice it would be if she would come join him in Japan during the inspection. Hopefully Jeff Watkins, an associate director, will be there. They can have breakfast. They can have lunch. Then can hang out together, as they had done previously. And then he says: No bank -- oops, I said too much. And that is the incriminating statement. That somehow pins this all on Jeff Wada.

The problem with that assumption is if we can go back to the email, slide E -- I'm sorry, slide D. D as in David.

The problem with that assumption is that nowhere in any records does Jeff Wada say that they're replacing it with a bank in Germany. Nowhere.

The information that Mr. Sweet is conveying is that Japan has been replaced by Germany. A bank. Jeff Wada is not on the Banking Team. He never has been. We talked about that yesterday. Who is on the banking team is Bob Ross. I'm not just pulling that name out of thin air again. Who did Mr. Sweet have lunch with just a couple of days before he wrote that email? Bob Ross. Again, that name just keeps showing up.

Is that proof beyond a reasonable doubt that Bob Ross was the source? Of course not. Definitely not. But it's context you need to know as you consider whether the government has disproved any reasonable alternative beyond a reasonable doubt.

Now, a couple of other pieces of information that are helpful in evaluating this.

You recall that Cindy Holder left the PCAOB in the fall of 2015 also. What did Brian Sweet suggest that Cindy Holder do? First he was asked when did she leave. It says, "Later on at the end of the summer. I think it was around August of 2015."

Sweet said:

"Q Before Cindy Holder left the PCAOB, did there come a time that you spoke with her about the documents that you had taken when you left the PCAOB?

"A Yes.

"When did that happen?

"While she was still at the PCAOB, so before she joined.

"what did she tell you -- what did you tell her?

"I told her how before I had left the PCAOB, that I had taken -- transferred the documents that were on my computer onto an external hard drive and that I had taken these documents with me, including the information I got out of the

IIS system.

"Q Why did you tell her that?

"Well, I knew that this information was helpful for me in my job and I certainly wanted Cindy to be successful in her job, too, so I told her what I had done, fully expecting that she was going to do the same thing.

"Did she bring those document with her?

"She did."

Brian Sweet told us that she did.

So at least as to the October email that the government talked about, this would have been shortly after Cindy Holder joined the PCAOB, bringing with her all of the documents that she stole from the PCAOB.

Again, was that information contained in the documents that she stole? We have no idea. That evidence wasn't put before you. But is it a reasonable alternative that should at least be considered before we charge and prosecute Jeff Wada for that based on the length of his phone calls?

Ladies and gentlemen, I'm not going to go through any more emails and texts with you. We spent a long time doing it yesterday. I just want to add one thing. I can't anticipate everything that the government might show you. I can't walk through every text message and every email. You would revolt if I did, and rightfully so. But I think we've talked about enough and you've seen enough about how this evidence has been

presented to you that you know what to look for. You know what questions to ask and expect to be answered so that you can evaluate anything that's put before you.

But before I sit down, I need to talk briefly about the elements of the charges that Jeff Wada -- of the crimes that Jeff Wada has been charged with.

These are the four charges. You'll see the first two are conspiracy charges. The last two are what we call substantive counts. And as both the government and I both said yesterday, the core, the heart of the case against Mr. Wada are those three inspection lists that are covered by Counts Four and Five.

The first two counts, conspiracy, they encompass the entire period that Brian Sweet was at KPMG, 2015 through 2017. And as the Judge will explain to you after summations are finished today, every charge has elements to it. One way of thinking about that are ingredients to a recipe. Think of a cake. Every recipe has a list of ingredients. Those ingredients are necessary to make the item. And if you miss, if you leave something out, you may have something but it's not going to be the cake that you wanted.

The same idea in a criminal case. The government must prove beyond a reasonable doubt each and every element, or ingredient, of each and every charge. If they don't do that, if any ingredient is left out, they don't prove that, then you

must find the defendant not guilty.

So before we talk about the elements, let's think about -- think of flour as being the heart of the recipe and the flour in this case being those three inspection lists. Let's talk about the conspiracy charge specifically.

The PCAOB is a private company. That's been established. It is not an agency of the United States. Nobody disputes that. So the government has charged that Mr. Wada did not conspire with the PCAOB but conspired with the Securities and Exchange Commission, which is an agency of the United States.

Here's the problem with that allegation. The government must prove that a conspiracy actually exists, and that Mr. Wada joined that conspiracy, and that he joined in the objectives of that conspiracy, that he voluntarily did that. In other words, whatever conspiracy Mr. Sweet and his circle of trust, or the core group, whichever category you want to call it, whatever conspiracy those folks may have had, the government must prove beyond a reasonable doubt that Mr. Wada intentionally joined that conspiracy and that he joined in the objective of that conspiracy, not just that he gave nonpublic information to Cindy Holder. That's not enough. But that he joined -- knowingly joined a conspiracy, and he understood the objective of it was to defraud the SEC. That's the heart of that conspiracy charge.

You did not hear any evidence, at all, that Jeff Wada joined a conspiracy with a group of strangers at KPMG for the purpose of defrauding the SEC. Nothing. Not a shred of evidence about it. He had no contact with the SEC. There is no evidence that the SEC even entered into his mind as he was going about his job, or, much less, as he was engaging in the supposed criminal activity he is charged with, that he even gave it a passing thought. Nothing.

I won't belabor that point.

If you find that he did not join that conspiracy, a conspiracy with that specific objective, then you must find him not guilty of Count One.

Count Two is conspiracy to defraud the SEC -- I'm sorry, the PCAOB. And aside from the issues we talked about yesterday, with there being no evidence that he was the source of the lists, you also must find evidence that he joined this conspiracy as well, and that he voluntarily joined it knowing the objective was to defraud the PCAOB.

Tom Whittle, the government's cooperator and so-called member of the conspiracy, you heard him testify he never met Mr. Wada. He didn't even know who he was. Brian Sweet barely knows Jeff Wada. He had no communications with Mr. Wada after he left the PCAOB. Mr. Middendorf testified the same way. Cindy Holder and Jeff were friends, but that's not evidence of this larger conspiracy.

And even if you believe that Ms. Holder and Mr. Wada conspired for the purpose of getting Mr. Wada a job at KPMG, that's not the conspiracy that the government has charged. They've charged a much broader conspiracy involving many more people to do something else entirely -- to defraud the PCAOB.

And there's no evidence that Jeff Wada joined in any conspiracy like that.

Let's take a look at a couple of the exhibits that sort of evidence the fact that there is no conspiracy here. Remember, Jeff Wada believed at this time that Cindy Holder was a friend. They had a private relationship, a place where they thought they could speak freely.

Take a look at this series of text messages. And you'll see that interspersed between messages between Jeff Wada and Cindy Holder, Cindy is simultaneously talking to Brian Sweet. And what's interesting as we read through these is look at the character of the conversation and how it changes when Cindy is talking to Jeff and when Cindy is talking to Brian. So:

"Jeff: "Jung was fired last week.

"Cindy: Wow.

"Jeff: Too bad they haven't fired any ADs.

"Jeff: LOL."

"Cindy to Brian: Wada said Jung was fired last week."

Completely different character. And what's

interesting here is Cindy doesn't say I'm going to let Brian -- I'm going to let Brian know, or join Brian in the conversation. She turns around and passes the information along directly to Brian Sweet.

Take a look at the next slide.

Brian Sweet testified that he believed Cindy Holder was manipulative.

Next slide. Can we see 109.

Cindy Holder to Jeff Wada: "Define shortly. Oh, and we need to chat later this week. Brian really wants you over here. So I told him I would take another run at you."

110.

Cindy to Brian: "Wada is e-mailing me list. He just arrived in DC. He accused me of stalking. LOL."

Cindy to Jeff: "I was just kidding. It hurts me when you don't fight. Haha.

Cindy to Brian: "Promotion announcement sent to personal email."

The list they are talking about is a list of promotions, something that there is no evidence of is confidential.

The reason why I show you these is to show this character of what's going on here. There is a game being played. Cindy is running a game on Jeff. Brian Sweet trying a game on her. They are manipulating each other for information.

And Jeff the whole time thinks he is talking to a friend. And as soon as he talks to a friend and talks about something that you would discuss with a friend about what's going on at work, she turns around immediately and passes that on to Brian Sweet.

And the reason why this is important is these are supposed to be co-conspirators. They are all supposed to be in this together -- conspiring to defraud the SEC and the PCAOB. This is not evidence of a conspiracy. It's evidence of betrayal of trust, of a betrayal of friendship. This isn't what you see when a group of people have gotten together and decided on this objective of what they're going to accomplish. This is Cindy playing Jeff. Cindy playing Brian. Brian playing Cindy. And that happens over and over again in these emails. It is not evidence of a conspiracy.

Now let's go back to slide 107.

This is Brian Sweet to Cindy Holder. You saw this earlier in the trial:

"Wada is the freaking man! I'd so love to hire him. Do you think he'd be willing to come do this international role?"

This is Brian Sweet talking to his co-conspirator Cindy.

We know that Brian had no intention of hiring Jeff Wada. He told us that. But here he's playing a game on Cindy. "I'd so love to hire him! Do you think he'd be willing to come

do this interactional role? I can leave Louann out and just gauge interest with Henderson. It would be awkward for Jeff as he'd have to recuse himself and likely want some time to pass after this inspection. Either way one day I want to buy that guy a beer!"

He had no intention of hiring Jeff Wada. He never did. He acknowledged that. But he's playing Cindy. He's running his own game on Cindy. She's running her game on Jeff Wada. That is not evidence of a conspiracy.

Now, remember the circle of trust, the people who are going to decide whether and how to use the information. Take a look at slide 112.

Brian Sweet.

"And to your recollection, that's the first time you heard this phrase 'circle of trust' in the context of this confidential information?

"Yes.

"Do you know if Mr. Wada was in the room?

"No.

"He was not, was he?

"No. Wasn't on the phone either.

"Did you relay the discussion you had with your KPMG partners about your plans for this information to Mr. Wada?"

So the reason why this is important is, again, Mr. Wada is supposed to be part of this conspiracy. And this

"circle of trust" group within KPMG that are meeting to decide what to do with this, what is the objective of this conspiracy going to be, how were they going to use it, are they going to use it, what are they going to do with it, Wada has no part of that whatsoever. Nothing. He is not involved. He wasn't there. The information wasn't conveyed back to him.

"That was the purpose of the meeting, right, is to discuss what you were actually going to do with this information now that you had it?

"A Yes.

"And Mr. Whittle said that he needed to maintain a circle of trust?

"Yes."

No Wada. He's simply not involved in this.

Take a look at slide 115.

"Jeff Wada was not a part of this circle of trust, was he?

"No, he was not."

Now, to be clear, you will hear in the Judge's instructions that the government does not need to show that Mr. Wada was in that room, or that he was on the phone, or that he knew every member of the conspiracy. They don't need to prove that. But here's the heart of it. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more persons to cooperate

with each other to accomplish an unlawful act. There must be a mutual understanding. And they must understand what that -- the goal of that conspiracy is. It may be a lot of things without that but it's not a conspiracy.

There is no evidence -- whatever you believed about Jeff Wada and whether he was the source of any of this stuff, as far as a conspiracy goes, there is no evidence that he joined in whatever conspiracy these KPMG employees might have had.

So because they have failed to establish that as to either Count One or Count Two, you must find him not guilty.

Let's talk about, for just a moment, the final two counts, the wire fraud counts.

I am not going to repeat all the reasons why they haven't proved that he was the source of the list. I just want to note, though, there is a difference between stealing and fraud, a difference between theft and fraud. They have charged fraud. And at the heart of that, the government must prove not just that somebody stole something, took something that didn't belong to them, but that, in this case, because it is fraud, that they did it with the specific intent to defraud that person. They must have had that purpose in their head as the reason why they were doing it, to defraud somebody, not just to steal it.

So the government must prove beyond a reasonable doubt

that not only was Mr. Wada the source of those three lists but that he took them with the specific intention of defrauding the PCAOB. And the Court is going to tell you that simply violating a workplace rule, violating the PCAOB's Ethics Code or EC9 that Barbara Hannigan told you about, that alone is not a crime. He must have had that fraudulent intent, that specific intent to defraud.

Because they haven't proven that, aside from all the other reasons why they haven't met the requirement for wire fraud in Counts Four and Five, because they haven't proven his specific intent, you must find him not guilty of those counts as well.

Now, at the start of the case, in my opening statement, I told you that the government would try and fill the holes in their case with the testimony of Brian Sweet, that essentially the case would be about that Brian Sweet would tell you what Cindy Holder told him, what Jeff Wada told him, and so on, and that would be the foundation of their case. And that is exactly what happened here. And I also told that you Brian Sweet was a liar. I told you that in the opening statement.

This was the last question and answer from my cross-examination of Brian Sweet:

"Q It would be fair to conclude that you were willing to tell a lie, even if it is a criminal lie, if you believe it will advance your own self-interest?

"A I have certainly done that in connection with all of the things I've talked about in this case. That is true."

That was Brian Sweet's last answer to me on cross-examination. And that is their case. And because of Brian Sweet's story telling, Jeffrey Wada was charged with these crimes in January of 2018. And for the past 13 months, Jeff Wada has entrusted himself to me, to Mr. Weddle, Ms. Jason and Mr. Ohta, and we've spent that time trying to unpack the lies, trying to take the blinders off, trying to show you the many reasonable explanations and interpretation of the evidence that the government has failed to disprove in this case beyond a reasonable doubt.

When I'm done, the prosecutor is going to have a chance to speak to you again. It is their burden so they get the last word. And I won't have an opportunity to point out those blinders. I won't have an opportunity to point out those errors, or shortcuts. I won't have an opportunity to test their evidence and argument any more. That I leave to you.

You will have to hold them to their burden. You will have to reject the arguments that you conclude they have not proven beyond a reasonable doubt. You must presume him innocent and not assume him guilty.

Jeff Wada, he entrusted himself to us, and we entrust him to you.

Thank you.

THE COURT: OK. We are going to have the rebuttal closing on behalf of the government.

Ms. Mermelstein.

MS. MERMELSTEIN: Thank you, your Honor.

Good morning.

The defense lawyers in this case are very good lawyers. They have worked very hard. But they are not magicians. They cannot with a wave of the hand and a clever argument and a misleading slide erase the overwhelming evidence that David Middendorf and Jeffrey Wada are guilty.

At the end of the day, I think this case really boils down to two questions, one for each defendant. And the question for Jeffrey Wada, as you just heard Mr. Cook say for quite some, time is: Was it him? Is he the guy, or was there some secret other source that no one has identified?

And the answer to that question is a resounding yes. It was Mr. Wada. The evidence is totally clear. There is no secret other source that has not been identified.

And for Mr. Middendorf, there is also really one question at the end of the day, and that is: Did he know that what he was doing was wrong?

And you know that the answer to that is "Yes." It is 100 percent clear that he knew what he was doing is wrong. And because the answer to each of those questions for each of these defendants is "yes," these defendants are guilty.

I want to spend time addressing those two basic arguments this morning, those two key arguments.

Now, Wada's basic argument, as I just said, is: You've got the wrong guy. It wasn't me.

He's not seriously disputing that there were leaks of confidential PCAOB inspection lists in 2016, in January 2017, in February 2017. He's just saying it wasn't me.

That argument is ridiculous. It is unsupported by any evidence. It defies common sense. So I want to walk through each of the ways you know that Jeffrey Wada was definitely the source.

Now, the first way is that Brian Sweet told you that. Each and every time Cindy Holder gave Brian Sweet a confidential inspection list, she told him where it came from. She told him how Jeff Wada got it. And she told him that Jeff Wada was person who gave it to her.

So what does counsel say to that? They say Sweet is a liar. You can't believe anything he says and he's really covering up for some secret leaker that is a different person. Or they say, well, maybe Holder was lying to Sweet about the source of the information.

That doesn't make any sense. Why would Cindy Holder lie to Brian Sweet -- her co-conspirator, her fellow member of the circle of trust -- about where she was getting the information? Why would she say it was Jeff Wada if it wasn't?

And, most importantly, why would she frame Jeff Wada? You saw the evidence in this case. They were friends. Right? They were close. If she was going to point the finger at someone and frame them, wouldn't it be someone she didn't like? It doesn't make any sense.

In fact, you heard that when this whole thing blew up, when the pieces started to fall apart, Holder went to Sweet and she said we have to keep Wada out of this. Like, we've been identified, but let's hide our source and say it was an anonymous letter. Holder tried to protect Wada. She wasn't framing him.

So then counsel says, OK, if it wasn't Holder, so then Sweet is framing him. And this is just a farfetched conspiracy theory.

Yesterday, counsel tried to argue that somehow it was at the end of the thing, when it was all falling apart and Sweet knew he needed a fall guy, he said: Oh, I have an idea. I'm going to point the finger at Jeffrey Wada. Because I know he's friends with Cindy Holder and I know he wants a job, so that's going to be a good story for us to tell.

But that cannot be true. Sweet had never seen Holder's phone records. He had never seen her text messages with Wada. He hadn't heard those voicemails that Wada left for her. And he had no way to know that, amazingly, all of the evidence would support that the source is Jeffrey Wada. He had

no way to know that every single time -- and I mean every single time -- Holder had a leak that she said was Wada, there are phone records that back that up. There are voicemails. There are text messages. There is a communication with Wada every single time.

Is that a coincidence? Sweet randomly picked Wada and then miraculously all of the records support it? That is not a coincidence, ladies and gentlemen. That's proof beyond a reasonable doubt.

And it didn't just happen one time. Right? The pattern that it's each and every time is how you know that there is really no question that the source was Jeffrey Wada.

Let me just say one more thing about this preposterous notion that in February of 2017 Sweet first decided I'm going to point this on Wada. Because in February and March of 2017, the only thing that was going on was an internal KPMG investigation. Right? KPMG wanted to know who of our employees has been involved in this. They don't care who the PCAOB leak is. That's not really their problem. But you heard that Brian Sweet told lawyers during that internal investigation, when no one was really worried about who the source was, he admitted it was Jeff Wada months and months before he had any reason to think that prosecutors would want to know who the leak was.

And so then defense counsel tried to say, well, you

know that Sweet is lying because his testimony about this is inconsistent with the testimony of Tom Whittle. He said that that was inconsistencies that Sweet told you that Jeff Wada was -- let me start over.

He said Whittle says that in March of 2016 on that call, where they came up with this plan, Whittle understood that the person who had been the leak was in banking. And he says Sweet told him that on the phone. And so defense counsel says, look, that's inconsistent. Wada wasn't in banking and Sweet told Whittle the source was in banking, so you know that Sweet is a liar.

The problem with that is that's not what Whittle said. That is completely misleading. You saw a quote from the transcript that references a statement by Whittle that Whittle then clarified, and defense counsel didn't show you the clarification. So let's look at what Whittle actually said about this.

Here's the question: "Before we move on, on the March 28th call -- the March 28, 2016 call that you said this morning that you understood that the source of the list was someone in banking, was that said on the call or was that just your understanding?

"That was my impression given the fact that most of the engagements on the list were banks."

Now, that is a perfectly reasonable understanding by

Tom Whittle. The list is banks. You'd think the person must be in banking. Sweet didn't tell him that, and he never said that. And for defense counsel to suggest otherwise to try and make Sweet look like he's lying is totally misleading.

Now, before I turn to all of the ways that you affirmatively know that Jeff Wada was the source, let me say a few words about this ridiculous argument that there is some other source, and maybe it is Bob Ross and maybe it is Jeff Watkins. Defense counsel tried to suggest that the government has blinders in this case, that the government is the frog that's being fooled by the scorpion. The government is not a frog. The government has not been fooled by Brian Sweet, and the government did not just rush to judgment. You heard that the investigation in this case started sometime after the initial reports. In February of 2017, there was a problem. And you heard when the defendants were arrested -- January 2018, almost a year later.

This case was investigated thoroughly.

Now, as you heard -- and this is very important -- the defendants have no burden. They don't have to put on any evidence. They don't have to do anything. But when they do do something, when they show you evidence, when they make arguments, you have to evaluate those with great scrutiny. Because it's very misleading for the defense to suggest that you didn't see any evidence of an investigation into Bob Ross

or Jeff Watkins.

First of all, as I expect Judge Oetken will tell you, the evidence is available to both sides. The witnesses are available to both sides. And as Mr. Cook himself conceded, they could have called Bob Ross if that was going to be useful. They could have called the agents who ran this investigation to walk through every single investigative step in this entire case. But you know what that would have shown: That all roads lead to Jeffrey Wada, that all of the evidence points to Jeffrey Wada.

And I don't want to waste too much more time on this, but the evidence is perfectly clear that none of these other people were the source of the key leaked information in this case. Right? You know that Jeffrey Wada leaked information about Sumitomo in October 2015, in November 2015, that he leaked part of the inspection list in March of 2016, that he leaked the preliminary list in January 2017, and the final list in February 2017. And everyone agrees that there are leaks that happened on that date. So you have to ask yourself who could have been the leaker on each and every one of those dates.

Well, Jeff Watkins was fired in February of 2016. He was gone by the end of the month. So he can't have been the source of leaked information in March of 2016. He didn't have access to the PCAOB information at that point. And he

certainly couldn't have been the source in 2017 in January, or 2017 in February; he had been gone from the job for a year.

So defense counsel says, well, but maybe Jeff Watkins took information with him when he left the PCAOB and then he waited a month to share it with Brian Sweet, or he gave it to Brian Sweet and then Brian Sweet waited a month to act on this time-sensitive information. Because, remember, in March of 2016, they're in the 45 days. The clock is ticking. That makes no sense. There is no way that Jeffrey Watkins is the source.

And it also cannot have been Bob Ross. Defense counsel suggested to you that maybe if you only knew more about Bob Ross, if only we had more of his documents, that then maybe it would turn out that he was the leak. But there was a suggestion that just the existence of Bob Ross is reasonable doubt.

But a reasonable doubt has to be "reasonable," and this is completely outside of reason. The defense says that you sort of haven't seen any evidence of Bob Ross' documents. But that's not true. Let's look at what you know about Bob Ross.

OK. Here is from Brian Sweet's telephone Bob Ross' contact information. Two phone numbers, work and mobile. You know how many phone calls Bob Ross had with Brian Sweet? Zero. Not one.

So -- and you heard that Bob Ross and Brian Sweet didn't live in the same place. Right? They would meet for lunch if they were in town at the same time. So they can't have been exchanging the information in person. It would have had to be on the phone.

You know, though, that they didn't communicate in October and November in 2015, right, when that Sumitomo information was leaked. They weren't having lunch on March 28, 2016, when the first list was leaked. And I'm going to come back to January 9th, by they weren't having lunch in February when that list was leaked. You saw the calendar invites. OK? Other than January 9th, which we are going to come back to, here are the times when they are meeting up: February 3rd of 2016, March 9th of 2016. This is weeks and weeks before the March 28th call. Brian Sweet didn't get this information from Bob Ross and then sit on it for weeks. That makes no sense. It cannot be Bob Ross.

And one other thing. The defendants have tried to suggest that -- and we'll come back to this -- there is something really unfair about how KPMG was being treated, and the problem was Bob Ross. He was out to get KPMG. He was too harsh. He was looking for a problem where there wasn't one. And they want you to think that that person is the same person who was feeding KPMG the answers to the test? It doesn't make any sense.

The whole notion that Sweet would frame Wada to try and protect Bob Ross is kind of crazy because Sweet didn't protect Bob Ross when he testified. Sweet told you that he got confidential PCAOB information from Bob Ross. He told you they would have lunch, they would go to dinner, and he would try and glean information he shouldn't have. He told you about how he took notes in the Notes function of his phone to remind himself of some things that Bob Ross had told him.

If Sweet is being open with you about the fact that Bob Ross shared confidential PCAOB information, do you think he would lie about, well, yes, he shared this information but not the inspection lists? He is not protecting Bob Ross. He is being honest about things Bob Ross did that he shouldn't have. There is no reason for him to then make up that Jeffrey Wada was the source of the inspection lists. So you know that none of these people is the source of inspection lists. That is ridiculous.

Let's move on and talk about how you know that Jeff Wada absolutely is the one and only source of the inspection lists. I am going to go through this quickly because Mr. Cook just showed you this this morning. You will remember that in October of 2015 Brian Sweet emails others -- Middendorf, Whittle -- and says, I got a call from an old colleague over the weekend that this decision has been made.

It's not just the fact that lo and behold there is a

phonecall from Cindy Holder to Jeff Wada. It's over the weekend, just like Sweet said. That email was on October 20th, a Tuesday. October 17th is Saturday of that weekend. Those things match up perfectly. It's not a coincidence.

You know what was said on this call because you saw what happened immediately afterwards. Then it happens again. Remember, there is an update. It turns out that PCAOB is now not going to look at a bank in Japan, and the exact same thing happens. It is that same day Cindy Holder calls and tells him. The defense counsel want you to think maybe Bob Ross told him a week before. This is the same day, breaking news, and Sweet is immediately sharing it.

The notion that maybe Cindy Holder brought this information with her and made up that it came from Jeffrey Wada, Cindy Holder left the PCAOB in the summer of 2015. This is breaking developments. She didn't have access to this information months before the decision would have been made. It can't be her.

Let's look at March 2016 too. I'm not going to go through this in great detail, but I want you to look at how revealing the time line is, how quickly things happen one after the other. They start at the top of this. You will remember there is this call from a number of Cindy Holder at KPMG to Jeff Wada for 51 minutes. Defense counsel said no, there is no recording of the call, we have no idea what was said on the

call. But that is not true.

A. The first way you know exactly what happened on this call is because you know what Jeffrey Wada was doing during this call. This is Government Exhibit 1378. This is the record of Jeffrey Wada's logins to the IIS system. Here is his login on March 28th of 2016, 11:53 a.m. You saw it is Central time, so it's 12:53 Eastern.

Do you know why that matters? Because look at when that is happening. He is on the phone with Cindy Holder when he logs into the IIS system. You don't know what they were talking about? He literally logged in to the system while he was talking to her.

He didn't log in to the system to get information about Christy Zhang. He didn't log in to get information about the banking inspections group that was being formed. That information isn't in IIS. The only information in IIS is inspection information. So you know exactly why he was logging in at the very moment in time that he was talking to Cindy Holder: to get the information that he was going to give her.

Look how consistent that is with what Brian Sweet told you. What, if anything, did Holder tell you about where Jeffrey Wada got the information? "She explained to me that Jeff had gone into the PCAOB's IIS system and had accessed the planning information for the inspection." That is exactly what happened. There is proof positive that that is what Jeffrey

Wada did, and here is proof positive that when Sweet told you that, he was exactly right.

Look at what happens next. The minute they get off the phone, it's the same minute she is desperately trying to find Sweet on his cell phone, his work phone, she is texting him. Why? To talk about a recruiting matter? That's not desperately important information. You know exactly why.

And in case it is not totally clear, look at what happens next in the chain. Sweet and Holder speak. They get off the phone. It's a 1:56 p.m. call, 23 minutes and 343 seconds long. Immediately after it's over, one minute later, Sweet is calling Whittle. Do you think that is about recruiting, it is so important that the minute people get the information they immediately have to call their supervisor? That doesn't make sense.

What do you know from this time line? Look at how quickly everything happens, how little time there is between the tipping chain from one person to the next person to the next person. A minute after Holder has the information, she is trying to find Sweet. A minute after he has the information, he wants to look for Britt and Whittle.

If this was a call about Christy Zhang or Jeff Wada's personal life or recruiting, it wouldn't be this urgent. They wouldn't be so desperate to find each other. Hours after Wada has provided this information, they are in that conference room

making a plan of how to use this information.

There is no real dispute that this information came in on March 28th of 2016, and there is also no real dispute about who provided it, the person at the very beginning of that fast-paced list of telephone calls, and that person is Jeffrey Wada. That's March of 2016. It's a hundred percent Wada.

Let's turn to January 9th of 2017. Defense counsel spent a lot of time making it seem like this time line was confusing or somehow misleading. Not true. Wada leaked this one just like he leaked the first one.

You saw the January 9th time line. They say the government is trying to mislead you because this is really a call about who the ADs are going to be in the banking group. First of all, this is a government exhibit. The government has made perfectly clear that what starts this text chain is a text message about that very issue. But that doesn't mean that that's what every communication in this is about. You know how conversations go. People bring up new topics, new things happen. And you know exactly what happened here because you listened to the voicemail.

(Audio played)

"I have the list," the grocery list. That tells you everything you need to know. That is not the voicemail of someone who's just giving an update on some personnel matters. That is a voicemail of someone who is up to no good. The tone

speaks volumes. You can hear how excited he is.

He is trying not to say exactly what it is he has. Why? The banking inspection group isn't that big of a deal. You don't need to be really surreptitious about what you are saying. Christy Zhang is interested in working at KPMG, that is not some great secret. You know exactly why he is using that tone and those words: because he has the inspection list.

Then defense counsel said, well, this is all thrown into question because you saw this email where Holder earlier in the day says she wants to talk to Sweet and Sweet thought that was the email that triggered the conversation. They say, see, Holder was trying to talk to Sweet before the information came in, so it can't be that this information came in. But that is silly. It is perfectly clear that Sweet is just misremembering the exact time of the conversation that happened three years ago.

You can tell exactly what that conversation was about based on Wada's logins to IIS. Let's look at this one. Here is January 9, 2017. He logs in at 1:29 Central, 2:29 p.m. Eastern. What is he doing right after this? You saw what happens. It's true, Holder brings up the banking list. Do you know what he does? Logs in to ISIS and immediately leaves her a voicemail saying he has the grocery list. And you know where the grocery list comes from. It is inspections information that is contained in IIS. It's not a secret what that call was

about.

Defense counsel tries to make this whole big deal about it's impossible to know what someone else's text messages mean, we can't understand what other people are saying to each other. It's just not true. It's just not true. You have common sense. You understand that people don't talk like this when they are doing things that are legitimate. These are communications that are criminal.

Defense counsel also tried to suggest to you that the government hid from you that Sweet misremembered the timing, they tried to hide from you notion that there is some inconsistency and he is misremembering. He said you didn't see this laid out for you in the summation because of the blinders the government has, the single-minded focus. That's not true. That's not what happened. Maybe you remember Ms. Kramer explained this to you in her closing. Here is what she said.

"You may remember that Whittle couldn't remember exactly when that day he got the list from Sweet, and Sweet thought it was right after lunch when Holder emailed him. But you have the documents to tell you the precise time. You know that it was later in the day because of the timing of the voicemail, the call, and the photo."

The government has been open about this from the beginning. This is just another example of why this idea that Sweet is just saying whatever he thinks is going to help the

government, he'll make anything up, is ridiculous. If he was trying to help the government, he would have lined his story up to all those documents. He didn't do that because he remembered it wrong, and he told you what he remembered honestly.

Here is another way that you know that Sweet didn't get this information earlier in the day, he got it later. First, you saw that when he met with Holder and took a photo of the page of notes where she had written down who the banking inspector would be. She had been asking about the banking inspectors, and that's one of the things Wada told her on the call. The really important information, the inspection list, Sweet wrote down himself. He got it all down in that folder. You know when that conversation about those two things happened because you have the photo that was taken at 7:45 p.m., after Jeff Wada had leaked the list.

You also know that from the domino effect of what happened. The first thing that Sweet always does is rush to tell Tom Whittle, and then Tom Whittle tells David Middendorf because Middendorf is the boss, he's running the whole scheme.

Look at this. Tom Whittle reached out to David Middendorf. It's not until January 10th. Why is it that it takes Whittle longer to reach out to Middendorf? Because he didn't have this conversation with Brian Sweet until very late in the day. If it had been at lunchtime, you'd have seen this

email vastly earlier.

You know that this email is what triggered that conversation about the list because you saw that when they have that call, Middendorf takes down the list in the notes on his phone, and that happened in the middle of the day on January 10th. The time line speaks for itself.

In case there is any doubt, let's look at February 3, 2017. It starts off in basically the same way. Wada texts Holder: "Okay, I have the grocery list, all the things you'll need for the year.

Wada wants you to believe that this is a list about people who work at KPMG or people who are looking for a job. That doesn't make sense. First of all, you remember that when the scheme all began to unravel, Holder and Sweet got together and said we've got to get rid of the really incriminating evidence, we are going to delete stuff, we are going to burn it, destroy it.

Look at this. Do you know which two text messages Holder deleted? "Okay, I have the grocery list and all the things you'll need for the year." She didn't delete, "Hey, flying home tonight." She didn't delete "Land 8:30 CST." She didn't delete "Safe travel."

Do you want to know why? Those aren't incriminating. She deleted the ones she knew were evidence of a criminal conspiracy. If these were nothing, if these were just

conversations between friends, why did she choose those two messages to delete? You know exactly why she did it.

And you know that this is not a conversation about Christy Zhang or recruiting or banking inspectors because "grocery list" is the same term Wada uses every time he has an inspection list for Cindy Holder. It could not be more plain.

As was the case every single time Holder got this kind of information from Wada, what she does next is tell you exactly what kind of information it was. Look at what happens the minute Holder and Wada get off the phone. One minute later Holder is calling Sweet. Same pattern every time. The pattern speaks for itself.

Just in case that itself doesn't convince you that Wada is obviously the leak, and really there can be no question, look at what was on his computer. You saw that on March 28, 2016, and January 9, 2017, Wada accessed IIS literally during his call with Holder or just before at the very place where the PCAOB confidential information resides.

In February 2017 he went a little further. You saw that he took a little more time to make sure he had all the information she wanted. You saw that on February 21, 2017, he downloaded a whole slew of confidential KPMG inspection information, the very information he needed to feed Holder the entire list. This is I believe credibly damning evidence. It proves he had the information that he leaked. He had no reason

to download these documents. So it proves that he was up to no good.

What does defense counsel do? You have to do something. He says, well, this evidence is very suspect because the IT security architect from the PCAOB who downloaded these documents, he doesn't have the same qualifications as a member of the Secret Service who looked at Middendorf's phone. That argument is kind of desperate.

You heard Chris Ren testify. Is there any question in your mind that that is a guy who knows a lot about IT? Frankly, how hard is it to copy a file from a computer? My grandmother could do that. You don't have to be an IT security professional to be able to download a couple of documents. That argument is ridiculous.

Of course a PCAOB IT person is the person who did the search, because the government was not yet involved in this way. You will recall that Chris Ren conducted the search in April of 2017. That's way before. Brian Sweet is not talking to anybody. This is a completely independent source of information that Jeffrey Wada is the leak.

Then counsel says, well, okay, maybe these were on Wada's computer, but the file structure says that he had a legitimate reason because he labeled this folder "Planning documents, examples from other firms." And just because Stephanie Rodriguez said this is totally unhelpful, it doesn't

make any sense, maybe he didn't care about the content, he just wanted to look at how they structured their documents. That doesn't make any sense either. One of the documents he copied was the GNF planning profile for KPMG. Every firm had its own. You don't need to compare your firm to another. It doesn't make sense.

Wada's decision to label the folder this way, that is a cover story. He knows he's not supposed to have these. He knows he has no legitimate reason. He's laying a trail for the defense that is ultimately going to come.

One other thing about this. Defense counsel made a big deal about the government hid from you the fact that there is an E&Y document in this group. Not true. This is a government exhibit, Government Exhibit 92. The document itself makes perfectly clear that that is an E&Y document.

We asked Stephanie Rodriguez to explain it to you. She told you she had seen the document and knew what it was. There's no secret there. This is part of the cover: see, it wasn't just KPMG documents, 95 percent may be KPMG documents, but I was looking at other things too.

Just this morning Mr. Cook said to you, I'm going to try and have it both ways. Wada is not the leaker, you should think it's someone else; but if he was the leaker, he wasn't trying to improve inspection results, he wasn't trying to target the SEC. That argument doesn't make any sense.

That's like a wife who is walking down the street and she looks in the window of a romantic French restaurant and her husband is having dinner with another woman. When he gets home, she says, I just saw you having dinner, and he says, wasn't me, must have been somebody else, but if it was me, it didn't mean anything. That doesn't make sense.

You can't have it both ways. The arguments don't hold together. It doesn't make sense to say that you weren't the source, but if you were the source, you didn't intend to do anything.

The argument that Wada didn't intend that the information would be used is ridiculous. The whole point of the information is to use it. It doesn't have value to Wada sitting in his house. The whole point of sharing it with Cindy Holder is so she can use it. And how do you use it? You use it to do better on inspection results so that the people who get those results will be fooled, so that they will think that things are better when they are not. And you know who gets those inspection lists: the SEC and the PCAOB, the targets of the scheme.

All of that means that Jeffrey Wada joined this conspiracy. There is not any other conspiracy. You are going to hear from Judge Oetken that not all the members of the conspiracy have to know each other. You don't have to know every detail. Frankly, it would make no sense for Jeff Wada to

be in the meeting at KPMG about how they are going to use the information. That's not his role. He gets the information and he gives it to them so they can use it.

They are all part of one scheme. Without each of them, the scheme couldn't exist. Without Wada, they wouldn't have the information. And without someone at KPMG to use it, there would be no point in stealing it. Everyone involved understood that that was exactly true.

The idea that somehow Wada was giving it to Holder and he didn't realize she was going to give it to Sweet, that they weren't going to use it more broadly at KPMG, that doesn't make sense. You saw that Holder was the intermediary. She is getting information from Wada and she is passing information back to Wada. Thoughts from Sweet on his résumé: "A thumbs up and a good job. We're going to buy you a beer." He knew exactly where the information was going.

This goes exactly to Mr. Cook's argument about the intent to defraud. He said there's a difference between stealing and fraud. That is true. But Jeffrey Wada didn't just steal the information and then take it home to use it as scrap paper. He used it to defraud the PCAOB and the SEC. That was the whole point of giving it to Cindy Holder. The notion that maybe he was just taking it for some other reason does not make sense.

Before I move on to talking about how you know that

David Middendorf knew exactly what he was doing was wrong, I want to spend a few minutes talking about just Sweet and Whittle. Defense counsel spent a lot of time attacking them. And defense counsel have to do that because their testimony is devastating. If you believe these witnesses, the defendants are both guilty without any other evidence. So you can understand why defense counsel has to attack them.

MR. BOXER: Objection.

THE COURT: My instructions will clarify the burdens here.

MS. MERMELSTEIN: Let me make that clear. Defense counsel doesn't have any burden. They don't have to do anything. We would never suggest otherwise. But you can ask yourselves why they are doing what they do do, whether or not those reasons reveal what's going on. It is clear that this is devastating evidence and they have to attack it.

MR. BOXER: Objection.

THE COURT: Same clarification. My instructions will make it clear.

MS. MERMELSTEIN: Thank you, your Honor.

There is no question that they have to attack this evidence.

You heard both of these witnesses testify and you know that they are telling the truth. First of all, they are corroborated by mountains of other evidence, by the text

messages, by the documents, by the IIS logins, by the emails, by the other witnesses who are part of these conversations. Sweet says that Whittle asked him to email the 2015 list. Whittle told you the same thing. Then you saw the email where that happens. Total corroboration.

Sweet says Wada gave Holder the 2016 list on March 28th of 2016. You saw Holder's phonecall with Wada. You saw that Wada was in fact logged in to IIS during that very call. And you heard from Whittle that immediately after that Sweet passed him the information. All of what they are saying is completely corroborated. It would be impossible for them to make this up and fit it together like this.

Defense counsel has suggested that, well, you can't believe them because they have previously lied. Less so for Whittle, mostly for Sweet. They said the government is turning a blind eye to Sweet, that we are letting him get away with his crimes because we need him so badly as a witness. That's not true.

First of all, the government doesn't need Sweet. You could convict both of these defendants if Sweet had never testified. There is plenty of evidence without him. But you can believe Sweet because he told you the truth. This whole idea that Sweet is still committing crimes and still lying about it and still revealing it, that's just not true. And it is not true that the government has let him get a pass.

We are really talking here about two things: a mortgage he got in 2012 where he lied about some of his assets, a mortgage that he has since paid off; and that while he had earlier disclosed that he had improperly used some of his rental properties for tax benefits, that that was also true with respect to this vacation cabin.

But he didn't get a pass for that. You saw 3522-36. After he entered into his cooperation agreement, when government found out about this, we made him take responsibility. He had to agree that while he is not going to be prosecuted, he is already facing 85 years, this conduct is going to be considered by the judge at his sentencing. He is taking responsibility. He is going to face the consequences of that. And he's got to make it right with the IRS. He's got to file new tax returns, and no promises about whether or not criminal charges will be brought. There's no benefit to Brian Sweet.

This may, frankly, be the silliest argument from the whole trial. What is the big gotcha on Brian Sweet, the smoking gun? It's a photo of a restaurant website. They want you to think that Brian Sweet can't be believed about anything because he said that the lunch he had was at the location of this restaurant on the right, but really it was at the one on the left. What does that prove?

The photo on the left is of the outside of the

restaurant. This is a restaurant chain. If you see a photo of an Olive Garden in Philadelphia and an Olive Garden in New York City and you say that looks like where I ate, now you're a liar? It's the same chain. It doesn't make any sense. Again, they have no burden. But if the restaurants look different inside, don't you think they would have shown you a photo of the inside?

MR. BOXER: Objection. May we approach, your Honor?

MS. MERMELSTEIN: I don't think that is necessary, your Honor.

THE COURT: I am just going to clarify for the jury that the government has the burden of proof, and any suggestion that the defendants have a burden of presenting evidence to show that they are not guilty, as my instructions will make clear, is not required.

MS. MERMELSTEIN: This argument is ridiculous. In fact, the whole idea that Whittle or Sweet would lie in this trial is ridiculous. Their sentencing doesn't depend on the outcome of this trial. As long as they are truthful, that is the one thing they have to do. If they are truthful, they get the benefit of cooperation.

Frankly, if they were going to lie, wouldn't they have done a better job? Wouldn't you think that Sweet would have said, oh, yeah, I didn't take that information in 2015 on my own; when I interviewed David Middendorf, he told me to do

that? But Sweet didn't do that. He is not trying to make it worse than it is. He is trying to tell you the truth. In 2015 the truth is he did that by himself.

The defense lawyers also are trying to have it both ways with Sweet and Whittle. When they like what they say, then they want you to believe them. But when the facts are bad for them, all of a sudden they are both liars. There are too many examples to give you. Let's talk about just a few.

Sweet said Holder was manipulating. That's exactly they want you to believe. But when he says Wada was a member of the conspiracy, now all of a sudden he was lying. Sweet says he got confidential PCAOB information from Bob Ross. Defense counsel says that you should believe. Sweet says, right, but not the inspection lists, those I got from Jeff Wada. Now it's a lie.

Sweet says, I took the 2015 GNF planning profile, that was me, I did it by myself. That they want you to believe. Sweet says, my first week Middendorf pressured me for confidential PCAOB information. That they say is a lie. Whittle says he organized a cover story for four additional engagements, he did that on his own. That they say is true. He says he told Middendorf that the 2017 January list was confidential PCAOB information. That's at a lie.

You cannot have it both ways. It does not make sense to accept their testimony only when it helps the defense and

reject it whenever it hurts them. It doesn't add up.

Let me now turn to the second big question: did Middendorf know that what he was doing was wrong? The answer is a resounding yes. David Middendorf was one of KPMG's highest level executives. He ran an enormous operation, multiple different divisions. He had enormous responsibilities. He was ultimately responsible for the relationship between the PCAOB and KPMG and for inspection results. You don't get to that kind of high-level position by being unsophisticated, by being uninformed, by being unaware.

But what David Middendorf wants you to believe is that he just didn't realize it was wrong. Ladies and gentlemen, that is not credible, it is not believe, and it isn't true. First of all, you don't have to be an expert in the PCAOB or the SEC or in audit firms to understand this is wrong. A fifth grader could know that this is wrong.

You can't cheat on tests. You can't steal information from your regulator to try and fool them into thinking that you are actually improving. You can't mislead the PCAOB and the SEC and your clients about whether or not audit quality is getting better. That's not rocket science. It's not hard to understand. It's completely obvious.

For people who did work in this industry, that was crystal clear. You heard a lot about what people at KPMG thought about having and using confidential information. All

of the people that you heard from in this trial had two things in common. One, they were David Middendorf's subordinates. He was their boss. Two, they knew that PCAOB selection information was highly confidential and that it was completely wrong for KPMG to have it.

This is obvious, but let's run through how many people knew that. Diana Kunz, you remember she is not in the national office, she is not a supervisor, she is just a regular engagement partner. She finds out in 2017 not that they have the whole list, they have her inspection. She knows something didn't seem right. The information was very specific, that it was going to be inspected. There was no ambiguity or uncertainty to it.

George Hermann, remember he is in the audit group. He is not involved in PCAOB inspections like Middendorf is, but he knows that this is not okay. When he found out, he was very agitated. He was fired up. He made derogatory comments about Mr. Sweet and said we should not have this information.

To Thomas Whittle, a member of the scheme, someone directly involved in the fraud, it couldn't be more simple: "I thought it was wrong. It was confidential. I knew at the time it was not something I was supposed to have."

Dave Marino, you will remember how upset he was when he found out this was going on. "I had a deep level of concern for the firm. We cannot have the regulator's selections,

period. There was only one course of action, and that course of action was to self-report this matter to the regulators, make them aware that we have the information, and allow them to select new engagements if they so choose. Hiding this is unethical and possible illegal."

Brian Sweet: Did you know that what you were doing in 2015, 2016, and 2017 was wrong? Yes.

Laurie Mullen, same thing: "We have that information inappropriately, that would have really compromised the integrity of the regulatory process, and the only appropriate action would be to go and self-report to the PCAOB and to allow them to make another selection."

Finally, and this one is interesting, Jay Hanson. Jay Hanson was called by the defendant, and he knew this was wrong. "PCAOB inspection selections are highly confidential." Here is what we asked him.

"Q. An audit firm can't hide from the PCAOB that they've devoted extra resources to certain audits based on the possession of confidential PCAOB information, right?

"A. I agree with that statement.

"Q. And that's true even if the extra resources devoted to those audits are designed only to improve documents, right?

"A. I would agree with that."

That is the defense's witness.

Literally every person who testified in this trial,

every person was one hundred percent sure that it was wrong to have confidential PCAOB information. Every single person but one. Amazingly, the one person who somehow didn't realize that this is a huge deal, he wasn't a brand new employee, he wasn't straight out of school. He was one of the highest executives in all of KPMG. It is not a coincidence that the one person who is trying to claim that they didn't realize it was wrong is also the one person who is trying to avoid a criminal conviction.

Middendorf tried to muddy the waters on it. He said Sweet sent gossip and predictions to other people, he had a list of 47 people who got emails from Sweet. He says, look, if they didn't know, then I didn't know. That is a complete distraction. Sweet emailed other people. You saw an email with a lot of people talking about a conference he went to. He didn't send emails about this fraud to 47 people. He didn't send inspection lists to 47 people. Defense counsel's arguments about this were really pretty misleading.

Do you remember this email? It's an email from Brian Sweet just to David Middendorf and Thomas Whittle. Defense counsel showed this to Mr. Middendorf when he testified and he showed it to you in closing, and he said:

"Look at the first sentence. 'I wanted to send you both a list of what I anticipate will be the most likely PCAOB banking inspection.'" He said, look, it says "anticipate."

This is just predictions.

Read the second sentence. "This list represents the PCAOB's view of the higher-risk banking audits based on the attributes it uses to evaluate, and so these were next in line for inspections here." This is from the PCAOB's own internal list. It's not subtle that this is confidential information.

Here is another way in which defense counsel's arguments on this were misleading. Defense counsel tried to tell you, well, Jay Hanson gave David Middendorf draft agendas for meetings and somehow that made it okay for them to be stealing confidential PCAOB information about inspections. There are two huge problems to this argument.

The first one is easy: that's not what Jay Hanson said. You heard from Jay Hanson himself. He was called by the defense as a witness. He said that he sometimes would schedule a meeting before the agenda went out with the understanding that the firm would get the agenda before the meeting took place. Here is exactly what he said.

"My general practice was meeting with the firm when they had the agenda in their hands, and sometimes, just for pure logistics to get something on the calendar, expecting that by the time I came the firm would have the agenda from the board or the staff, as it transmitted it, as a basis for the discussion."

He didn't say David Middendorf drafted agendas every

time there was a meeting. But even if he had, so what? In what world does getting the agenda for a meeting make you think that you can steal confidential PCAOB information and use it to cheat on inspections?

At the end of the day, all of these arguments -- everyone else knew it was wrong, that's not what Jay Hanson said -- there is something even more fundamental here. Despite what defense counsel tried to argue to you, even Mr. Middendorf couldn't hold this lie together. I'm going to talk in a minute a little more about his testimony.

But just think about this point. On direct examination he said, "I did not know this was wrong, and even today I don't believe it was wrong." But when he was pressed on that point, even he had to admit that that is not true. Here is what he was asked on cross-examination.

"Q. Now, Mr. Middendorf, you testified you didn't recall the 2015 list, but if you had the PCAOB inspection list, the complete list, you would understand that was confidential PCAOB information, right?

"A. Yes.

"Q. That's information you shouldn't have, right?

"A. Correct."

Here's more.

"Q. And I believe you testified that if you had gotten the inspection list from the PCAOB, that would not be okay, right?

"A. Correct.

"Q. Because that would be confidential information?

"A. Correct."

Ladies and gentlemen, those are just a different way of saying that it's wrong. And that is the end of this inquiry. There is no dispute in this case that David Middendorf got confidential PCAOB information in 2016 and there is no dispute that he authorized its use. The only dispute is did he know it was wrong, and even he had to admit that he knew it was wrong. That in and of itself makes him guilty of the conspiracy counts and the 2016 count that is in Count Four.

Before I turn to some of the other counts, let's talk about just a few more ways that you know that David Middendorf knew that this was wrong. The next way you know that is because he lied about it, because he kept it a secret, kept it a secret within KPMG and he kept it a secret from the PCAOB. Let's look at the lies that were told in connection with launching the secret stealth re-reviews.

You will remember that in that March 28th call Whittle, Britt, Sweet, and Middendorf all agreed that they were going to use the ALLL monitoring program as a cover. That is a call Mr. Middendorf says, I don't remember being on. But lo and behold he is on that email when they actually launched that plan into action.

Britt sends out this email to all of the engagement

partners for all of the engagements in ALLL. Why does he copy Middendorf? Because Middendorf is the boss. Because Middendorf is the head of this scheme. He is the one who has authorized this plan. He signed off on it.

Including all the engagements on this email, that's the first lie. There was never any intention of looking at every single one of these engagements. The only intention was to look at the ones that were on the list. It is a cover-up.

Look at what the email itself says. "As part of our wrap-up and reporting of the results of the ALLL monitoring program, we need to gather some additional information." That's not true. This isn't a part of the wrap-up, and they are not gathering additional information. That is a lie. It's a cover story. The only reason that you need a cover story is because you are committing a crime.

Let's fast-forward. You will recall that all those secret re-reviews, they worked. KPMG nails it on the ALLL inspections. They have zero comments. You saw the talking points for the PCAOB meeting that David Middendorf went to after that. They are bragging about how good the results are.

And the PCAOB wants to know, how did you do it? What caused the change? They have a lot of reasons: "We utilized root cause analysis to identify significant remedial actions. This included substantial training. Implementation of an invasive risk-based monitoring and support program."

Do you know what it doesn't say? It doesn't say we had secret re-reviews. It doesn't say we got a list of information, we had an early heads-up. And why not? If David Middendorf really thinks this is okay, why is it a secret? Why don't you want to tell PCAOB what you are really doing? There is one very clear answer: because he knew it was wrong.

One more point about Middendorf's efforts to hide this from the PCAOB. Yesterday counsel showed you this exhibit, Government Exhibit 940. Middendorf is not on this, you will remember. He said, look, this is evidence --

MR. BOXER: Objection. This is exactly what we argued, your Honor. It is not evidence, it is not in our argument.

MS. MERMELSTEIN: I am responding to the argument counsel made.

THE COURT: You can respond to the argument.

MS. MERMELSTEIN: Thank you, your Honor.

That is the argument defense counsel made. You know that Whittle and Sweet had an intent to deceive. Why? Because they were involved in launching a secret cover-up to look at these four not on the list so that PCAOB wouldn't realize what they were doing.

He said this is incredibly strong evidence of Whittle and Britt's specific intent to defraud. And that is true. Whittle and Britt had a specific intent to defraud, and their

involvement in the cover-up is great evidence of that. But just like this email shows you that Whittle and Britt are guilty, Middendorf's efforts to hide the re-reviews from the PCAOB shows why he is guilty.

Let me make two quick asides here. Middendorf tried to argue that he didn't have a duty to the PCAOB. That is a completely misleading argument. As Judge Oetken is going to instruct you, he didn't have to have a duty. He had to know that someone had a duty. Jeffrey Wada had a duty. He signed documents saying he would follow EC9 and then he violated that. That's the duty that was violated. Middendorf knew that that was happening. That's what makes him guilty.

Let me say one other thing. There was a lot of talk by Middendorf's counsel that Whittle said they knew this was wrong but they didn't specifically know that it was a crime. That does not matter. You don't have to be a lawyer to be able to commit a white collar fraud. You have to know that it was wrong. Ignorance of the law is not a defense.

Let me now turn to Mr. Middendorf's testimony itself. The last way you know that he knew this was wrong is how carefully he crafted his testimony. He tried very hard to present himself well. He tried to avoid making it obvious that his story was a lie. That has some appeal, right? We want to believe people. It is very hard to look at someone and say that was a lie. But that is exactly what happened.

Mr. Middendorf is smart and he lied well. But at bottom it was a lie. When you think about what he said very carefully, you will see how carefully he had to thread that needle. He had a very good memory of the facts that were good for him. But then all of a sudden, when a fact was bad for him, then he had one of three approaches: he tried to avoid answering the question; he just denied remembering anything at all; and in the rare case where he really had no choice, he admitted the bare minimum he could get away with.

Let me give you a few examples of where he fought and tried to avoid things that were obvious because they were so bad for him.

The first one is that the basic premise of all these re-reviews was to improve inspection results. Here is what Middendorf said. He said it again and again and again in exactly these words. "The purpose was to take credit for the work that had been done prior to the report release date."

What does that even mean, the point was to take credit? The way you get credit with the PCAOB is by not getting comments. That's the whole ballgame. There is no such thing as taking credit but not trying to improve inspection results. He tried so hard not to admit that that was the purpose because he knows that that is how they were defrauding the PCAOB and the SEC.

How about this one. Remember Mr. Middendorf was asked

about that email that goes out to the ALLL monitoring program and contains all these lies. He was asked:

"Q. Looking at this email, you testified it's misleading. In fact, it really is an outright lie, isn't that fair to say?"

He said, "It is not truthful."

What is the difference between something that is a lie and something that not truthful? This is someone who is trying to wiggle out of trouble.

Think about all the things he didn't remember, all of the things you would expect him to remember because they were important, because they were a big deal. He doesn't remember that he asked Sweet for information about Wells Fargo at lunch. He doesn't remember that he asked Whittle to get the 2015 list. He doesn't remember that Barbara Hannigan had a training where she explained, among other things, EC9.

He remembers going to the SEC for a meeting, but he has no recollection that a big focus of that meeting was how bad the inspection results were. He doesn't remember being on the March 28, 2016 conference call. He doesn't remember Britt's email to all the ALLL participants.

He doesn't remember knowing that January 9, 2016, was confidential information. And he doesn't remember that they did anything with that information. He doesn't remember George Hermann, when he found out, saying this is going to jeopardize the firm. He doesn't remember the details of his conversation

with Mullen. And he doesn't remember deleting the January 9th list from his phone.

These are major events. Does it really make sense that Middendorf remembers telling Sweet not to tell him anything he shouldn't at the first lunch? I say remembers because there is no evidence of that. The only person who says it is David Middendorf. But he remembers that and nothing else? It's totally implausible. It does not make sense.

Everything he claims he doesn't remember, you know it happened because you saw the documents. You heard from the other people who participated in those conversations.

Let me give you two examples of how implausible this lack of memory is. Let's look at 2015. You've seen this email a bunch of times. Whittle emails Mittendorf, "The complete list. Obviously very sensitive. We will not be broadcasting this." Is there any world in which Thomas Whittle sends this to Middendorf out of the blue with zero explanation, this highly confidential information they shouldn't have? Just sends it, no FYI, no what are we looking at?

It's out of the question. You know that Middendorf asked for this. When he says he doesn't remember, that's not true. The idea that I don't read every email I get? It says "obviously very sensitive." You would definitely read that email.

Let's talk about how he thought that the January 9,

2017 list was just a set of predictions, that one he didn't know was confidential. There is no dispute that Whittle told Middendorf that the March 2016 list was confidential and the February 2017 list was confidential. So, why was Middendorf saying, oh, January he didn't tell me that?

In March he's got this excuse about the documentation. February he's got this story that he was trying to report it. January has no explanation. They had it, they used it, and he was in on it. So he says, I thought that was just predictions. That doesn't make any sense.

Thomas Whittle told him it was confidential in March of 2016. He told him it was confidential in February of 2017. In January he hid that from him? You saw that every single time Whittle had this information, he went directly to Middendorf. The notion that these prediction lists, you saw them come by email all the time, that this one had to be relayed in a phonecall where Middendorf is typing it into the Notes function of his phone is completely ridiculous.

It is also completely clear when Middendorf said he doesn't remember when they did anything with January, that that's not true. Remember Whittle testified that among the many things he and Middendorf agreed to do was to assign extra resources to Valero.

Look at Government Exhibit 1145, January 17, 2017, just after they got the list. Whittle emails Scott Henderson

and he says, we want to utilize your oil and gas background. And he says, Dave -- you will recall "Dave" is always Dave Middendorf, "David" is Britt -- also approved our using our combined resources on this one. This is a hundred percent proof that they are doing something with the list.

Yesterday defense counsel told you, this email is helpful to me because this proves that Thomas Whittle didn't tell you the truth when he testified because Whittle didn't say anything about assigning Scott Henderson to Whittle. That is completely inaccurate. Look at what Whittle actually said.

"Valero is an oil and gas company, and they had contacted Cindy Holder early in January before the list to get involved in reviewing some of the areas, which I had approved. Around the time the preliminary list came out, there was another request for some additional assistance that came through Cindy Holder, and as a result of that I assigned another partner to step in and look at some oil and gas specific areas that were outside of her expertise."

Right. That's exactly what Whittle said: an oil and gas person. Scott Henderson is the oil and gas person. This shows you that Whittle was telling the truth.

Last point on Mr. Middendorf's intent. Counsel has tried to suggest to you that Middendorf was somehow demonstrating good faith when he gave in-house counsel at KPMG a copy of the list from his phone. But here is what he avoided

mentioning: that he deleted relevant information from that list before he turned it in.

Let's look at this, 1144. On the left is the list that went to counsel. You will see example number 26 is Macy's. But Middendorf gave a cleaned-up list just listing the engagements. Do you know what was deleted? Look at this: Macy's, all of the focus areas, net sales, pension assets and liabilities, inventory, vendor allowance, and store closures.

This is not a little point because this itself proves to you that David Middendorf was definitely intending to use this information. You don't need the focus areas for an engagement that you are involved if you're just not going to do anything with it. And why do you delete it before you send it to counsel? To hide the fact that you are intending to do something.

This should remind you of someone else. Look at this. Government Exhibit 650, that's Brian Sweet sending a list to counsel. It doesn't show your good faith that you send documents when they are demanded by counsel of the company you work for. That's what Sweet gave them, and it is exactly the same thing. It's not the real list, it's just the list of engagements.

What did Sweet not include? For Macy's, exactly the same thing, right? It's hard to read his handwriting, but you have the same exact focus areas written in Sweet's handwriting.

These two are behaving exactly the same way, and that is not a coincidence. They are giving counsel the minimum information they can while trying to cover up what they were really intending to do.

There has also been some suggestion at this trial that even if this was a fraud, it doesn't really matter because it didn't really interfere with inspections. That is ridiculous. Every witness who testified at this trial told you that that first meeting is super important, that a well-prepared team can avoid comments. You know that's true.

This is just one example. You will recall there was a series of text messages between Sweet and Holder where they are worrying about the fact that a first meeting went poorly and now there may be comments. It is not in dispute that those first meetings could result in comments.

Where they are really trying to mislead you is on this issue of documentation. You heard a mantra repeated by defense counsel and then by Mr. Middendorf this line from a PCAOB release: we don't issue comments solely for documentation. Solely for documentation.

That doesn't mean that the documentation doesn't affect whether or not there are comments. That means if you forgot to upload a document but you can prove you have it, that's not a comment. Every single person who testified in this trial told you that the quality of documentation affects

comments. The defense's own witnesses told you that.

Jay Hanson, PCAOB board member: "My personal view is the quality of documentation could affect whether an issue is raised or a comment is written." There isn't any doubt about that. You saw that the PCAOB required KPMG to give them a detailed list of every documentation change if they got early notice, because they cared about changes to documentation.

You also know that documentation changes mattered because those re-reviews were only focused on documentation, and they were enormously successful. The improvements to the documentation got comments down to zero. They didn't go from 5 to 4, they went to zero. Every person involved -- Stephanie Rodriguez, from the PCAOB, Whittle, Sweet -- every person involved understood that this was a result of the cheating.

Do you know what the best evidence is that this mattered to the PCAOB? What they did when they found out about the cheating, they threw out the inspections. They started over because they knew that there was such a complete taint from changes to documentation that the results could not be trusted.

You also heard the argument that it was really unfair, the PCAOB was too harsh, and somehow that makes it okay what happened here. This is the argument that was made to you yesterday. This Mr. Hanson's testimony. "A PCAOB board member told Dave that PCAOB inspections are unfair. He used the

expression 'gotcha,' and he said that the inspections team would pick firms to have a turn in their box, take turns on who they would focus on."

Skipping to the last paragraph, "This is critical because it explains Mr. Middendorf's understanding of the PCAOB, and he authorizes the re-reviews because following AS 3 it would make the workpapers clearer so KPMG would get the credit or comment it deserves."

First of all, that is not what Jay Hanson said. Jay Hanson said, I don't remember any conversation like that. Mr. Middendorf claims that conversation happened. Ask yourselves who you believe: a completely disinterested third party called by the defense or a defendant who is on trial and is trying to justify his actions.

Let's say it is actually not true that the PCAOB was treating KPMG unfairly. You heard from Wes Bricker the SEC looked into that and they confirmed it's false. But that is really is not the point.

Think about what defense counsel is saying here. David Middendorf thought it was okay to cheat because the system was unfair. That is a shocking argument. If your child came home from school and you got a call from the teacher they had been caught cheating on a test, and your child's response was, yeah, but the test was really unfair, it was too hard, would you say, oh, well, that makes it okay then? Of course

not. You can't cheat if the test is too hard. The rules still apply to you.

I expect Judge Oetken is going to tell you exactly this: the fact that the PCAOB was an onerous regulator, if in fact that is true, is completely irrelevant.

There has also been a fair amount of talk about, well, look, maybe we tried to defraud the PCAOB but we really didn't intend for it to be the SEC. First of all, let's not be confused about what the law is, which you are going to hear from Judge Oetken.

The fraud on the SEC doesn't have to be the sole purpose. It doesn't even have to be the primary purpose. It has to be a purpose. And the defendants don't have to lie directly to the SEC, they don't have to interact with the SEC directly in order to be guilty. They have to take an action, cheating on PCAOB inspections, with the aim of interfering with the SEC's lawful function.

There is no dispute that the SEC oversees auditors. That is one of its lawful functions. You heard that from Wes Bricker of the SEC. You heard it from the defense witness Jay Hanson. You heard it even from the defendants' hired gun Paul Atkins. There is no dispute that causing the SEC to get inspection results with fraudulent results is interfering with their ability to, among other things, oversee the auditors.

I won't go through of them all, but Wes Bricker

explained to you all the different ways in which the SEC relies on this.

Paul Atkins, the defense witness who is being paid almost $1500 an hour -- he has been paid so much in this case he doesn't remember how much -- even he admitted, yes, the SEC oversees auditors, the SEC brings enforcement actions against auditors, these reports came to us, they went to the office of the chief accountant which is focused on audit quality.

He said, I never read them. So what? That doesn't suggest the SEC is not using them. These are reports that are mandated by law to go to the SEC. People thought that was for no reason? They thought it just got dropped in the trash somewhere? Of course they were being used by the SEC.

And Middendorf had firsthand knowledge of this because he went to a meeting at the SEC where everyone was livid about how bad the inspection results were, although he somehow can't remember this. So he had firsthand knowledge that inspection results were something that the SEC was relying on.

You heard from Brian Sweet and from Thomas Whittle, the members of this scheme, that they intended to defraud the SEC. They told you themselves. They have taken responsibility for that. They have pled guilty to those counts. It cannot be disputed.

I want to say just one more thing before I sit down. You have heard a lot from defense lawyers in closings about

reasonable doubt. That is the standard of proof in this case. It is the government's burden, it is one that we embrace. But the defense lawyers tried to make that sound like some impossible standard, some standard that could never be met.

Reasonable doubt is not a magical thing. It is not some unattainable thing. It is the same standard that has been applied in every courtroom in every corner of this country since this country was founded in 1792.

Over the last four weeks you have heard from everyone, from the participants in this crime to the whistle-blowers who reported it. You have seen and heard the defendants' own words, text messages, voicemails, and emails. You no longer have any reasonable doubts. So we are have confident that when you return to deliberate, you will return the only verdict that is consistent with the evidence in this case and with the law, that these defendants are guilty.

Thank you.

MR. BOXER: Your Honor, may we approach?

THE COURT: Yes.

MS. KRAMER: May we take it up after the break, your Honor?

THE COURT: Can I give them a break?

MR. BOXER: If they need a break, sure. I prefer to do it now unless they need a break.

THE COURT: Come up now.

(At the sidebar)

MR. BOXER: First let me say for the record I'm raising a relatively minor complaint about what was just said, and by no means do I waive my prior objections and the contemporaneous ones that I made.

Two points. First, I think counsel misstated my argument regarding Mr. Hanson. In fact, the slide she put up was my argument, and she told the jury that my argument was it was okay to be stealing confidential information. I didn't make that argument. I made the one she displayed.

I would ask that your Honor instruct the jury that not only does their recollection govern with respect to the evidence, but their recollection also governs with respect to the arguments of counsel. That is my application. That's why I asked for them not to be excused.

I do have a separate request. Counsel said that Mr. Hanson was a completely disinterested third party. Based on that argument to the jury, I would ask that forthwith I receive the ex parte communications submitted by the government and by Mr. Hanson's counsel. I have no ability to judge that statement. I made this application the other day. I don't know why it was ex parte. But given that representation to the jury, I think we are entitled to receive those forthwith.

THE COURT: On the latter point, I think the reason it was ex parte was because it potentially revealed government

strategy, so I don't see any reason to not turn it over.

MS. MERMELSTEIN: Your Honor, I think that is not the full reason. It relates to confidential things that are both, as I understand it, subject to confidentiality agreements and personal. So it's not only because it reveals government strategy. Also, as we said yesterday, there was an ex parte letter filed yesterday by counsel for Mr. Hanson, so it shouldn't be in the absence of his participation.

I also think that the argument on the issue of his bias was bias against the government. The idea that he was not someone who would be interested in helping the defense is generous in that characterization. I don't think it triggers any need to disclose it. I don't think it has to be resolved now.

With respect to the instruction, it was a rebuttal argument. There were numerous interruptions and objections because they didn't like the argument. I think your Honor is going to, as you should, instruct the jury in the normal course about arguments not being sort of anything. I don't think any specific instruction in an effort to make it seem like the argument was improper is remotely necessary. That is how the government viewed the argument made by defense counsel. The actual words were on the screen, so it is really not misleading.

MR. BOXER: I didn't contemporaneously object when

counsel said that, but she said I argued that Hanson showed that it was okay to be stealing confidential information. I didn't make that argument, and the argument she put up on the screen made clear I didn't make that argument. I'm not asking you to highlight it. I'm not asking you to rebut Ms. Mermelstein. I'm just asking for an instruction to the jury that their your recollection controls.

THE COURT: I don't have a problem making that general point. I don't think it calls anything out.

MS. MERMELSTEIN: I just don't think it should be made now. I think it is fine to be in the general instruction, but I don't think there is any reason to have a specific instruction immediately following rebuttal. There wasn't one following the closings.

MR. BOXER: I just gave the basis for it: because she clearly misstated my argument.

MS. MERMELSTEIN: There were many things I thought were misstated in the defense closings. We didn't ask for a special instruction then. That's argument.

THE COURT: I think I can do it in a way that is general.

MR. BOXER: Thank you.

MR. WEDDLE: Your Honor, there were three ways in which the rebuttal summation was completely improper. There were five examples.

MS. MERMELSTEIN: Perhaps we should take a break.

MR. WEDDLE: That was said exactly my suggestion. I'll try to do them quickly because we want the jury to start deliberating. But there are some pretty severe issues.

MR. BOXER: I appreciate the instruction. Thank you.

(Continued on next page)

(In open court)

THE COURT: Ladies and gentlemen, yes, I'm going to give you a break now. Just before I do, I just want to say something about where we are.

In terms of scheduling, we are planning to go until 2 o'clock today because there are a couple of scheduling issues. So the next thing in line is for me to give you the instructions on the law, which will govern your deliberations. And I'll do that after the break, I believe.

The other thing I am just going to mention is you have heard all the evidence in case, you have heard the closing arguments of the parties. There are different interpretations, different characterizations of the evidence by their argument. What matters is evidence. It is not what the lawyers argued but what is the actual evidence in the case. The documents I admitted and the testimony of the witnesses under oath, that is the evidence in the case and that's what you'll be focusing on when you deliberate.

If there is any difference in how you heard an argument from one of the lawyers from your recollection and view of the actual evidence, it's your recollection that controls and your interpretation of the evidence itself. Also, if there is -- the way one lawyer characterized how one other lawyer made an argument in the closing arguments, it's your recollection of the attorney's actual argument that controls.

So if they say something about what the other side said that's different, you recall -- it's your recollection of the argument that controls for each party's summation.

But in the end, it's your interpretation of the evidence that will control. So if there is any difference between that and what one of the lawyers said, then it's your view of the evidence that will determine your verdict.

We're going to take a ten-minute break now. Please leave your pads on your chairs, and we'll start back in ten minutes.

(Continued on next page)

(Jury not present)

MS. MERMELSTEIN: Your Honor, I respect that counsel wants to raise some issues. Could we actually take a break first and then deal with the argument?

THE COURT: Sure. Why don't we take five minutes and then we'll come back.

(Recess)

THE COURT: Mr. Weddle.

MR. WEDDLE: Thank you, your Honor.

The rebuttal summation was completely improper in three ways. It improperly impugned defense counsel and defense counsel arguments. That's one category, and it happened in two examples. It also injected the prosecutor's personal knowledge into the case. I have three examples of that. And, finally, it improperly vouched for the witness, Mr. Sweet. I have one example of that.

I can go through the examples.

The relief that I'm requesting is that your Honor strike the improper arguments and add a couple of sentences to your general instruction on arguments by lawyers not being evidence, to instruct the jury to disregard the specific categories that I can go through.

So improperly impugning defense counsel and defense arguments, the prosecutor said at one point, referring to defense counsel, "Where they are really trying to mislead you."

That's a completely improper thing to say. And in addition, your Honor, the prosecutor improperly impugned defense counsel by saying that there was some inconsistency in defendant Wada's argument that puts the government to its burden of proof on all the elements.

And so I think that both of those things are improper.

I think that there was also an improper and imflammatory analogy used by the prosecutor in the context of impugning defense counsel for Mr. Wada. I think that the prosecutor alluded to a situation of marital infidelity, which I found to be improper, inflammatory, and ironic given some of the sealed briefing that has taken place in this case at the behest of the government.

So what I would request in that regard is that the Court instruct the jury: There is nothing inconsistent in defense counsel holding the government to its burden on all elements. I specifically instruct you to disregard Ms. Mermelstein's arguments to the contrary.

In terms of injecting Ms. Mermelstein's personal knowledge into the case, she did that three times. She stated that the government thoroughly investigated the case. She talked about what the agents would say if they were called to testify. And she talked about when the government became involved, that is, she said the government was not yet involved. So we would request that the Court instruct the jury

to disregard the prosecutor's comments about what happened in the investigation and when the government began its investigation.

Finally, your Honor, the prosecutor improperly said the following sentence, which was vouchering for the witness: "You can believe Sweet because he told you the truth." It is completely improper and it should not have happened.

MS. LESTER: We have just two more issues, your Honor. We join in those arguments made by counsel for Wada. There were two specific statements that related to points relevant to Mr. Middendorf. The first, to which Mr. Boxer objected at the time, had to do with the photograph of the restaurant.

As Mr. Boxer said in his summation, it is a minor point as to whether Sweet remembered or not. The broader point is that, of which the government is aware, is that it's likely their mistake that led to him misidentifying the exhibit; that is, they showed him a photograph and he agreed that that was where he had lunch. But in order to -- rather than just letting that go gracefully, the prosecutor said, "Don't you think if defense counsel thought that the inside looked different, they would have shown you the inside?" that's completely improper. It's putting the burden back on the defense. And it's pointing to a situation where we don't know for sure, I'm speculating, but I suspect that it was a mistake by the prosecutors themselves where they put a photograph in

front of the witness. The witness didn't really remember, but he wanted to please them and so he agreed that that was the location. And no one confirmed that that was in fact the location, the proper photograph of the inside.

Secondly, with respect to Mr. Hanson, the prosecutor described him as completely disinterested. If your Honor recalls, at the sidebar while Mr. Hanson was on the stand, the government alluded to the fact that it might wish to impeach Mr. Hanson on the basis of whatever was in the ex parte submission, or something related to the ex parte submission. And we haven't seen it so we don't know what it is. But there was an indication that the government thought that there might be some bias there.

So for the prosecutor to then state that he's completely disinterested and to characterize it at sidebar as assisting the defense by doing that, it is just unbecoming, when the prosecutor knows full well that they had information that they were threatening to impeach him with.

So it is just not fair to make that argument in front of the jury. We would ask that your Honor strike those arguments.

MS. MERMELSTEIN: Every single thing I've said in rebuttal was 100 percent proper argument. The notion that some of it should be struck is preposterous.

One, no one was impugning counsel personally. Counsel

made arguments to the jury that in the government's view were not accurate, were misleading, and miscited testimony. And that's what we said. That is a hundred percent appropriate. The point of rebuttal is to comment on the arguments that were made by defense counsel. And the suggestion that there is something wrong with doing that is ludicrous.

There is nothing inflammatory about marital infidelity. It is an analogy. There is nothing in this case that is before the jury that relates to that. And it was an analogy and a rhetorical point about thinking about why arguments are being made. It does not burden-shift.

I said more times in this rebuttal than I have ever said that the jury should be reminded about the burden, that it never shifts. But the government has to comment on the way the defendants have presented the evidence and in particular on the defense efforts to point to certain evidence or to suggest that certain evidence would exist if only the government had done something. It has to be allowed to comment on that. And that necessarily is going to require, in some instances, that the government suggest why the defense has done something in a particular way, notwithstanding that, as I said many times, they have no obligation to do anything.

So there is, for example, nothing improper about suggesting to the jury that a photo of the outside of a restaurant used to suggest what it looks like inside is

misleading. The restaurants look the same. They are branches of the same thing. And the fact that Sweet thought the photo of one looked like the inside of the other is completely consistent. It doesn't impeach him at all. I understand the argument defense counsel wants to make, that he'll say yes to whatever is put in front of him. That's just not true. And the government was certainly able to argue that the reason the defense presented evidence a certain way is because of what sort of doing it a different way would have shown.

That is the same with respect to the argument about the government investigation. The defense created this problem. They got up and tried to suggest that somehow the government hadn't looked into things, which it knows is not true. They tried to argue about evidence that might exist that they know does not exist. And everything I said about the investigation is based on what is in the record. It is not based on my personal knowledge. One.

The timing of the investigation between when the conduct happened and when the charges happened, that is in the record. There was testimony about when this all was revealed, and testimony about when Mr. Sweet first proffered, which is before the sort of charges were brought and when the charges were brought, and defense counsel argued that Sweet was sort of the first thing the government learned and everything flowed from that, and so all of that is completely proper.

To make an argument that there is an absence of something in the investigation when there is no proof of that, it is perfectly reasonable for the government to say they have no burden, but these witnesses were available and there is a reason that they didn't call them, because you can assume that it would not have helped them. That is a perfectly proper argument. And so all of that is from the record and perfectly proper argument.

"You can believe Sweet because he told you the truth" is not vouching. I never said one word about what I believe, what the government believes, why it is that we are confident that he told the truth in this case, that we would, for example, not have let him testify if we didn't know he was telling the truth. I said nothing about that. I said, based on your analysis of what you saw him do, in response to attacks on his credibility, you can believe him because you can tell that what he said was the truth. That is not remotely approaching anything that comes close to vouching.

With respect to the comment about Mr. Hanson, I think it is perfectly appropriate to say that this is a witness called by the defense, so you would expect that they -- I don't think that anything about saying that he was impartial, based on the substance of his testimony, because his testimony was in fact impartial, is in any way improper, undercut by the fact that there are circumstances in which the government, if he had

evinced a bias, which we didn't know if he had, would have moved to impeach him.

So I think this is all completely appropriate, and I think that efforts by defense counsel to get an instruction from the Court to comment on the rebuttal or to strike portions of it is totally unwarranted and just an effort to suggest to the jury that your Honor has a view, or to try and undermine the fair arguments that were made in rebuttal and so it should be rejected completely.

THE COURT: The only ones -- I think I generally agree with the government. The only things I think that might have been close to the line would be the suggestion that they could have gone out and gotten evidence about the restaurant. I mean -- and I think at the time I just said I'll clarify that the government always has the burden of proof. And I do think that Ms. Mermelstein repeatedly said that the government always bears the burden of proof. So I think it was essentially harmless.

The second thing -- and the second thing is something Mr. Weddle raised, which is this idea of alternative arguments and that somehow his two sort of alternative arguments, I don't think there is anything wrong with the analogy. I mean, you know, there are scorpions, there are frogs, there are all sorts of analogies. I don't think that a marital infidelity analogy is necessarily improper per se. But to suggest that they can't

have alternative arguments I think is maybe not fair.

Do you want to respond to that?

MS. MERMELSTEIN: Yeah. Your Honor, I don't think the governments feels that they can't have alternative arguments. I think it absolutely is fair to comment on the reasonableness or consistency of the defendants' arguments. And I think that your Honor is going to instruct the jury that the government has the burden, it has the burden on every element. And I don't know if there is anything unclear about that before this jury.

So I think that argument was proper. I think even if your Honor thought that it came close to a line, it is absolutely not warranting of any kind of striking or special instruction. The general instructions about the government's burden more than adequately inform the jury of who has the burden and what has to be found, and they will evaluate each argument on each element.

MR. BOXER: Briefly, your Honor.

The inside of the two restaurant do look different. So, I don't know what Ms. Mermelstein basis that representation on that they are the same, if it is an assumption, if she has seen photographs that are different than ours. But we didn't put those in because, as Ms. Lester pointed out, we were making a bigger point about what happened between the government and Mr. Sweet regarding the restaurant itself, but the insides look

different.

And as far as Mr. Hanson, the statement was he was completely disinterested. That was the argument. As Ms. Lester pointed out, they alluded to potential impeachment the first time I raised the issue. I can't respond without seeing both submissions, and so I would just ask that they be provided to us and see if there is anything further to say about completely disinterested.

Thank you, your Honor.

MR. WEDDLE: Would you like me to say again my requested instruction?

THE COURT: Well, no, I don't think it is appropriate because I think, insofar as there is anything here that was close to the line, I think it is fully covered by my instructions, particularly my instruction that the closing arguments of the lawyers are not evidence, and it is the evidence that they will be focusing on. The burden of proof is what it is. I define the presumption of innocence. I define everything. So I think they are all covered by my instructions.

MR. WEDDLE: Well, respectfully, I would request that your Honor reconsider at least giving the single sentence in the part about "arguments by lawyers are not evidence" to say, "There is nothing inconsistent in defense counsel holding the government to its burden on all elements."

MS. KRAMER: Your Honor, the principle behind that, that the government has to prove each element, is already fully covered by your Honor's instructions. That will add nothing but confusion to what the Court's charge already very clearly sets out.

THE COURT: I agree.

MR. WEDDLE: Your Honor, the prosecutor spent probably five minutes improperly impugning the defense argument, and now for the prosecution to say it is just going to be confusing to talk about it I think doesn't make any sense. If they thought it was worth spending that much time in rebuttal to make an improper argument, it should be corrected.

THE COURT: I think it is adequately covered by the instructions.

Anything else?

(Pause)

MS. KRAMER: No, your Honor.

THE COURT: We will bring in the jury.

(Pause)

MR. WEDDLE: Does your Honor intend to close the doors for the charge?

THE COURT: Yes, I think so.

MR. WEDDLE: I've seen some judges, I don't know if it is your Honor's practice, warn the spectators that they should either stay until the close of the charge or leave now and not

during the charge. If that's your Honor's practice, great, but if not --

THE COURT: Not necessarily. If someone needs to leave, I don't think it is the end of the world. But I will have the doors closed to avoid distraction.

MS. KRAMER: Your Honor, there are two binders up on the ledge there that have the government exhibits that have been received in evidence.

(Continued on next page)

(Jury present)

THE COURT: You may be seated.

Good afternoon, ladies and gentlemen.

JURORS: Good afternoon, your Honor.

THE COURT: Members of the jury, you have now heard all the evidence in the case as well as the final arguments of the parties. We have reached the point where you are about begin your -- about to undertake your final function as jurors. You have paid careful attention to the evidence, and I am confident that you will act together with fairness and impartiality to reach a just verdict in this case.

My duty at this point is to instruct you as to the law. There are three parts to these instructions. First, I'm going to give you some general instructions about your role and about how you are to decide the facts of the case. These instructions really would apply to just about any trial. Second, I'll give you some specific instructions about the legal rules applicable to this particular case. Third, I'll give you some final instructions about procedure.

It is your duty to accept these instructions of law and to apply them to the facts as you determine them. With respect to legal matters, you must take the law as I give it to you. If any attorney or witness has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You must not

substitute your own notions or opinions of what the law is or ought to be.

Listening to these instructions may not be easy. It is important, however, that you listen carefully and concentrate. I ask for your patient cooperation and attention. You'll notice that I'm reading these instructions from a prepared text. It would be more lively, no doubt, if I just improvised. But it's important that I not do that. The law is made up of words, and those words are very carefully chosen. So it's critical that I use exactly the right words.

You'll have copies of what I'm reading in the jury room to consult, so don't worry if you miss a word or two. But for now, listen carefully and try to concentrate on what I'm saying. Remember, you are to consider these instructions together an as whole; you are not to isolate or give undue weight to any single instruction.

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

Do not conclude from any of my questions or any of my rulings on objections or anything else that I have done during

the trial that I have any view as to credibility of the witnesses or as to how you should decide this case. Any opinion I may have regarding the facts is of absolutely no consequence. It is your sworn duty, and you have taken your oath as jurors, to determine the facts.

Now, just as I have my duties as a judge and you have your duties as jurors, it has been the duty of each attorney in this case to object when the other side offered testimony or other evidence that the attorney believed is not properly admissible. It has been my job to rule on those objections. Therefore, why an objection was made or how I ruled on it is not your business. You should draw no inference from the bare fact that an attorney objects to any evidence. Nor should you draw any inference from the fact that I might have sustained or overruled an objection.

From time to time, the lawyers and I had conferences outside your hearing. These conferences involved procedural and other matters, and none of the events relating to these conferences should enter into your deliberations at all.

To be clear, the personalities and the conduct of counsel in the courtroom are not in any way at issue. If you formed any reaction of any kind to the lawyers in this case, favorable or unfavorable, whether you approved or disapproved of their behavior as advocates, those reactions should not enter into your deliberations.

In reaching your verdict, you must remember that all parties stand equal before a jury in the courts of the United States. The fact that the government is a party and the prosecution is brought in the name of the United States does not entitle the government or its witnesses to any greater consideration than that accorded to any other party. By the same token, you must give it no less deference. The government and the defendants stand on equal footing before you.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendants' race, religion, national origin, gender, sexual orientation, or age. All persons are entitled to the same presumption of innocence, and the government has the same burden of proof with respect to all persons. Similarly, it would be improper for you to consider any personal feelings you might have about the race, religion, national origin, gender, sexual orientation, or age of any other witness or anyone else involved in this case. The defendants are entitled to a trial free from prejudice, and our judicial system cannot work unless you reach your evidence through a fair and impartial consideration of the evidence.

Now I am going to instruct you on the presumption of innocence. The law presumes the defendants to be innocent of all charges against them. In this case, the defendants before

you have pleaded not guilty. In so doing, they have denied the charges in the Indictment. Thus, the government has the burden of proving the defendants' guilt beyond a reasonable doubt.

This burden never shifts to the defendants. In other words, the defendants do not have to prove their innocence. They are presumed to be innocent of the charges contained in the Indictment. The defendants thus began the trial here with a clean slate. The presumption of innocence was in their favor when the trial began, continued in their favor throughout the entire trial, remains with them even as I speak to you now, and persists in their favor during the course of your deliberations in the jury room.

This presumption of innocence also requires you to acquit the defendants unless you as jurors are unanimously convinced beyond a reasonable doubt of their guilt, after a careful and impartial consideration of all the evidence in this case. It is removed if and only if, as members of the jury, you are satisfied that the prosecution has sustained its burden of proving the defendants guilty beyond a reasonable doubt.

Now, the question naturally arises: What, exactly, is a reasonable doubt? The words almost define themselves. A reasonable doubt is a doubt that a reasonable person has after carefully weighing all the evidence. It is a doubt founded in reason and arising out of the evidence in the case -- or the lack of evidence. Reasonable doubt is a doubt that appeals to

your reason, your judgment, your experience, your common sense. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her affairs.

I must emphasize that beyond a "reasonable" doubt does not mean beyond all "possible" doubt. It is practically impossible for a person to be absolutely and completely convinced of any disputed fact that, by its very nature, cannot be proved with mathematical certainty. In the criminal law, guilt must be established beyond a "reasonable" doubt, not all "possible" doubt.

Further, the government is not required to prove each element of the offense by any particular number of witnesses. The testimony of a single witness may be enough to convince you beyond a reasonable doubt of the existence of the elements of the charged offense -- if you believe that the witnesses testified truthfully and accurately related to what he or she has told you.

That all said, if, after a fair and impartial consideration of all the evidence (or the lack of evidence), you have an abiding belief as to the defendants' guilt beyond a reasonable doubt -- a belief that you would be willing to act upon without hesitation in important matters in the personal affairs of your own life -- then it is your sworn duty to

convict the defendants.

On the other hand, if after a fair and impartial consideration of all the evidence (and lack of evidence), you are not satisfied of the guilt of the defendants with respect to the charges in the Indictment; if you do not have an abiding conviction of the defendants' guilt; in sum, if you have such a doubt as would cause you, as prudent persons, to hesitate before acting in matters of importance to yourselves -- then you have a reasonable doubt, and in that circumstance it is your sworn duty to return a verdict of not guilty.

In reaching that determination, your oath as jurors commands that you are not to be swayed by sympathy or prejudice. You are to be guided solely by the evidence in this case and you are to apply the law as I instruct you. As you sift through the evidence, you must ask yourselves whether the prosecution has proven the defendants' guilt. Once you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict. Thus, if you have a reasonable doubt as to the defendants' guilt, then you must render a verdict of not guilty. But if you should find that the prosecution has met its burden of proving the defendants' guilt beyond a reasonable doubt, then you should not hesitate because of sympathy, or for any other reason, to render a verdict of guilty.

The question of possible punishment of the defendants

is of no concern to the jury and should not enter into or influence your deliberations. The duty of imposing sentence in the event of a conviction rests exclusively upon the Court. Your function is to weigh the evidence or the lack of evidence in the case and to determine whether or not the defendants are guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow any consideration of the punishment that may be imposed upon the defendants, if they are convicted, to influence your verdict.

Similarly, it would be improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process. Your verdict must be based exclusively upon the evidence or the lack of evidence in this case.

Now, I have repeatedly referred to the evidence in the case, and that raises an important question: What is evidence? I instruct you that evidence consists of the sworn testimony of the witnesses, the exhibits received in evidence, and the stipulations of the parties. In determining the facts, you must rely on your own recollection of the evidence.

What, then, is not evidence? I want to instruct you that the following does not constitute evidence: First, testimony that I have stricken or excluded is not evidence. You may not use it in rendering your verdict. If certain testimony was received for a limited purpose, you must follow

the limiting instructions I have given, and use the evidence only for the limited purpose I indicated.

Second, any exhibit that was not received in evidence is not evidence. Thus, exhibits that were marked for identification but not admitted into evidence are not evidence. Nor are materials that were used only to refresh a witness' recollection.

Third, arguments by the lawyers are not evidence. The reason is simple. Advocates are not witnesses. The opening and closing arguments of both sides explained how each side wants you to analyze the evidence, which consists of the testimony of witnesses, the documents and other exhibits that were entered into evidence, and the stipulations of the parties. What the lawyers have said to you is intended to help you understand the evidence -- or the lack of evidence -- as you deliberate to reach your verdict. However, it is your recollection of the facts -- I'm sorry. However, if your recollection of the facts differs from the lawyers' opening statements, questions to witnesses, or summations, closing arguments, it is your recollection that controls, not theirs. For the same reason, you are not to consider a lawyer's or a party's questions as evidence. Only the witness' answers are to be considered evidence, not the questions.

Finally, any statements that I may have made do not constitute evidence. It is for you alone to decide the weight,

if any, to be given to the testimony you've heard and the exhibits you've seen.

I will now discuss at slightly greater length some important matters related to evidence.

There are two types of evidence that may properly be considered in reaching your verdict.

One type of evidence is direct evidence. Direct evidence is testimony by a witness about something he knows by virtue of his own senses -- something he has seen, felt, touched, or heard. For example, if a witness testifies that when he left his house this morning, it was raining, that would be direct evidence about the weather.

The second type of evidence is called circumstantial evidence. Circumstantial evidence is evidence that tends to prove a disputed fact indirectly, by proof of other facts. There is a simple example of circumstantial evidence that is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day outside. Assume that the courtroom shades were drawn and that you could not look outside. Assume further that as you were sitting here, somebody walked in with an umbrella that was dripping wet and then, a few moments later, somebody else walked in with a raincoat that was dripping wet.

Now, because you could not look outside the courtroom

and you could not see whether it was raining, you would have no direct evidence of that fact. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to conclude that it was raining. That is all there is to circumstantial evidence.

You infer on the basis of your reason, experience, and common sense from one fact that's established the existence or the nonexistence of some other fact.

As you can see, the matter of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a logical, factual conclusion that you might reasonably draw from other facts that have been proven.

Many material facts, such as someone's state of mind, are rarely easily proven by direct evidence. Usually such facts are established by circumstantial evidence and the reasonable inferences that you draw. Circumstantial evidence may be given as much weight as direct evidence. The law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must be satisfied that the government has proven the defendant's guilt beyond a reasonable doubt, based on all the evidence in the case.

There are times when different inferences may be drawn from the evidence. The government asks you to draw one set of inferences. The defendants ask you to draw another. It is for

you, and for you alone, to decide what inferences you will draw.

You've heard evidence in the form of stipulations. A stipulation of testimony is an agreement between the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given the testimony. However, it is for you to decide what effect that testimony should be given.

You've also heard in the form of stipulations that certain facts were agreed to be true. You've also heard evidence in the form of stipulations that certain facts that were agreed -- that were agreed to be true. In such cases, you must accept those facts as true. However, it is for you to decide what weight, if any, to give to those facts.

Now, some of the exhibits that were admitted into evidence were in the form of charts and summaries. You should consider them as you would any other evidence.

As I have already explained, you should draw no inference or conclusion for or against any party by reason of the lawyers making objections or my rulings on such objections.

By the same token, nothing I say is evidence. If I commented on the evidence at any time, do not accept my statements in place of your recollection or your interpretation. It is your recollection and interpretation that govern.

Further, do not concern yourself with what was said at sidebar conferences or during my discussions with counsel. Those discussions related to rulings of law.

At times I may have admonished a witness or directed a witness to be responsive to questions or to keep his or her voice up. At times I may have asked a question myself. Any questions that I asked, or instructions that I gave, were intended only to clarify the presentation of evidence and to bring out something that I thought might be unclear. You should draw no inference or conclusion of any kind, favorable or unfavorable, with respect to any witness or any party in the case by reason of any comment, question, or instruction of mine. Nor should you infer that I have any views as to the credibility of any witness, as to the weight of the evidence, or as to how you should decide any issue that is before you. That is entirely your role.

You have had the opportunity to observe the witnesses. It will now be your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

To that end, I'm going to give you a few general instructions on how you may determine whether witnesses are credible and reliable, whether witnesses told the truth at this trial, and whether they knew what they were talking about. It

is really just a matter of using your common sense, your good judgment, and your experience.

First, consider how well the witness was able to observe or hear what he or she testified about. The witness may be honest, but mistaken. How did the witness' testimony impress you? Did the witness appear to be testifying honestly and/or candidly? Were the witness' answers direct, or were they evasive? Consider the witness' intelligence, demeanor, manner of testifying, and the strength and accuracy of the witness' recollection. Consider whether any outside factors might have affected a witness' ability to perceive events.

Consider the substance of the testimony. How does the witness' testimony compare with other proof in the case? Is it corroborated or is it contradicted by other evidence? If there is a conflict, does any version appear reliable, and, if so, which version seems most reliable?

You may consider whether a witness had any possible bias or relationship with a party or any possible interest in the outcome of the case. Such a bias or relationship does not necessarily make the witness unworthy of belief, but it can. These are simply factors that you may consider.

In passing upon the credibility of a witness, you may also take into account any inconsistencies or contradictions as to material matters in his or her testimony.

In summary, you should carefully scrutinize all of the

testimony of each witness, the circumstances under which each witness testified, the impression the witness made when testifying, the relationship of the witness to the controversy and the parties, the witness' bias or impartiality, the reasonableness of the witness' statement, the strength or weakness of the witness' recollection viewed in the light of all the other testimony, and any other matter in evidence that may help you decide the truth and importance of each witness' testimony.

If you find that a witness has testified falsely as to any material fact, or if you find that a witness has been previously untruthful when testifying under oath or otherwise, you may reject that witness' testimony in its entirety or you may accept only those parts that you believe to be truthful or that are corroborated by other independent evidence in the case.

It is for you, the jury, and you alone -- not the lawyers, not the witnesses, and not me as the judge -- to decide the credibility of witnesses who testified and the weight that their testimony deserves. The ultimate question for you to decide in passing upon credibility is: Did the witness tell the truth before you?

In a criminal case, the defendant cannot be required to testify, but if he chooses to testify, he is, of course, permitted to take the witness stand on his own behalf. In this

case, Mr. Middendorf decided to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case. However, the burden of proof remains on the government at all times, and the defendant is presumed innocent.

Mr. Wada did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant. A defendant is never required to prove that he or she is innocent.

You may not attach any significance to the fact that Mr. Wada did not testify. No adverse inference against him may be drawn because he did not take the witness stand. You may not consider this against Mr. Wada in any way in your deliberations in the jury room.

You have heard from two witnesses, Brian Sweet and Thomas Whittle, who testified that they pled guilty to criminal charges. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendants on trial from the fact that prosecution witnesses have pled guilty to criminal charges. A witness' decision to plead guilty is a personal decision about his or her own guilt. It may not be used by you in any way as evidence against or

unfavorable to the defendants on trial here.

Mr. Sweet and Mr. Whittle each testified pursuant to an agreement to cooperate with the government. The law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of an accomplice may be enough in itself for conviction if the jury finds that the testimony establishes guilt beyond a reasonable doubt. It is also the case, however, that accomplice testimony is of such a nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

I have given you several -- I have given you some general considerations on credibility, and I will not repeat them all here. Nor will I repeat all the arguments made on both sides. Nevertheless, let me say a few things you might want to consider during your deliberations on the subject of accomplices. You should ask yourself whether Mr. Sweet and Mr. Whittle would benefit more by lying or by telling the truth. Was either witness' testimony made up in any way because he believed or hoped that he would somehow receive favorable treatment by testifying falsely? Or did he believe that his interests would be best served by testifying truthfully? If you believe that the witness you are considering was motivated by hopes of personal gain, was the motivation one that would cause him to lie, or was it one that

would cause him to tell the truth? Did this motivation color his testimony? In sum, you should look at all of the evidence in deciding what credence and what weight, if any, to give to an accomplice witness.

Keep in mind that it does not follow that simply because a person has admitted to participating in one or more crimes, that he is incapable of giving a truthful version of what happened. Like the testimony of any other witness, the testimony of someone who has participated in a crime should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness' demeanor, candor, the strength and accuracy of a witness' recollection, his background, and the extent to which his testimony is or is not corroborated by other evidence in the case.

One final note in this regard. It is not concern of yours why the government made agreements with witnesses. Your sole concern is to decide whether the witnesses -- whether the witness was giving truthful testimony in this case before you. In sum, you should look at all the evidence in deciding what credence and what weight, if any, you will give a witness' testimony.

You have heard testimony from what we call expert witnesses. An expert is a witness who, by education or experience, has acquired learning or experience in a

specialized area of knowledge. Such witnesses are permitted to give their opinions as to relevant matters in which they profess to be an expert and give their reasons for their opinions. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

Now, your role in judging credibility applies to experts as well as other witnesses. You should consider the expert opinions that were received in evidence in this case and give them as much or as little weight as you think they deserve. If you should decide that the opinion of an expert was not based on sufficient education or experience or on sufficient data, or if you should conclude that the trustworthiness or credibility of an expert is questionable for any reason, or if the opinion of the expert was outweighed in your judgment by other evidence in the case, then you might disregard the opinion of the expert entirely or in part.

On the other hand, if you find the opinion of an expert is based on sufficient data, education and experience, and the other evidence does not give you reason to doubt his conclusions, you would be justified in placing reliance on his testimony.

During the trial, you heard testimony bearing on the character of Defendant David Middendorf. Character testimony

should be considered together with all the other evidence in the case in determining the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where, without such evidence, no reasonable doubt would have existed.

But if, on considering all the evidence, including the character evidence, you are satisfied beyond a reasonable doubt that the Defendant is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit Mr. Middendorf merely because you believe he is a person of good reputation.

The testimony of a character witness is not to be taken by you as the witness' opinion as to the guilt or innocence of a defendant. The guilt or innocence of a defendant is for you alone to determine, and that should be based on all the evidence you have heard in the case.

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection that the witness may have toward one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party. You should also take into account any evidence of any benefit that a witness may receive from the outcome of the case.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her

testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weigh it with care, and subject it to close and searching scrutiny.

Of course, the mere fact that a witness is interested in the outcome of the case does not mean he or she has not told the truth. It is for you to decide from your observations and by applying your common sense and experience and all the other considerations mentioned whether the possible interest of any witness has intentionally or otherwise colored or distorted his or her testimony. You are not required to disbelieve an interested witness. You may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

During the trial, you heard the names of several other individuals mentioned in connection with this case. Some of those individuals have been mentioned in connection with what the government alleges was illegal activity.

I instruct you that you may not draw any inference, favorable or unfavorable, towards the government or the defendants from the fact that any other person is not on trial here. Further, you may not speculate as to the reasons why those other people are not on trial, or what became of them in the legal system. Those matters are wholly outside your concern and have no bearing on your duties as jurors in this case.

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court.

Although you may consider that fact when you are evaluating the witness' credibility, I should tell you that there is nothing unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he or she will be questioned about, focus on those subjects, and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Again, the weight you give to the fact or the nature of the witness' preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

There are several people whose names you have heard during the course of the trial but who did not appear here to testify. I instruct you that each party had an equal opportunity, or lack of opportunity, to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called.

You should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. The burden remains with the government to prove the guilt of the defendants beyond a reasonable doubt.

You have heard reference in the arguments and cross-examination of defense counsel in this case to the fact that certain investigative techniques were or were not used by the government. There is no legal requirement, however, that the government prove its case through any particular means. While you are to carefully consider the evidence adduced by the government, you are not to speculate as to why they used the techniques they did or why they did not use other techniques. The government is not on trial. Law enforcement techniques are not your concern. However, you are free to consider a lack of evidence in your determination of whether the government proved the charged crimes beyond a reasonable doubt. Your concern is to determine whether, on the evidence or lack of evidence, the government has proven the defendants' guilt beyond a reasonable doubt.

Defendants David Middendorf and Jeffrey Wada are on trial together. In reaching your verdict, however, you must bear in mind that innocence or guilt is individual. Your verdict must be determined separately with respect to each defendant, solely on the evidence or lack of evidence presented

against that defendant, without regard to the guilt or innocence of anyone else.

In this regard, you must be careful not to find any defendant guilty by reason of relationship or association with other persons. The fact that one person may be guilty of an offense does not mean that his or her friends, relatives, or associates were also involved in the crime. You may, of course, consider those associations as part of the evidence in the case, and may draw whatever inferences are reasonable from the fact of the associations taken together with all the other evidence in the case. But you may not draw the inference of guilt merely because of such associations. In short, for each defendant the question of guilt or innocence as to each count of the Indictment must be individually considered and individually answered, and you may not find any defendant guilty unless the evidence proves his guilt beyond a reasonable doubt.

Now I am going to turn to the substantive instructions.

Let me first turn to the charges against the defendants as contained in the Indictment. The Indictment is not evidence. It is an accusation, a statement of the charges made against the defendants. It gives the defendants notice of the charges against them. It informs the Court and the public of the nature of the accusation.

A defendant begins trial with an absolutely clean slate and without any evidence against him. Remember that the charges in the Indictment are merely accusations. What matters is the evidence or lack of evidence that you heard and saw in this trial.

The Indictment in this case consists of five counts, or charges. I will at times refer to each count by the number assigned to it in the Indictment. You should know that there is no significance to the order of these numbers or the specific number of counts charged, and indeed my instructions will follow a different order than the order in which the various counts appear in the Indictment.

Each count is a separate offense, or crime. Each count must therefore be considered separately by you as to each defendant named in that count, and you must return a separate verdict of guilty or not guilty on each count as to each defendant. Whether you find a defendant guilty or not guilty as to one count should not affect your verdict as to any other count charged.

In Count One of the Indictment, the defendants are charged with conspiracy to defraud the Securities and Exchange Commission, commonly referred to as the "SEC," which is an agency of the United States. In Count Two, the defendants are charged with conspiracy to commit wire fraud against the Public Company Accounting Oversight Board, commonly referred to as the

"PCAOB." In Count Three, Mr. Middendorf is charged with wire fraud itself, which is sometimes called a substantive count. Mr. Wada is not charged in Count Three of the Indictment. In Counts Four and Five, both defendants are charged with substantive counts of wire fraud.

In a moment, I will instruct you on each of these charges in more detail. At the outset, however, let me instruct you that you must consider each individual charge separately, and each defendant separately, and evaluate each on the proof or lack of proof that relates to that charge with respect to each defendant.

As I have just described, there are certain counts in the Indictment that are conspiracy counts, while others are what I'll refer to as substantive counts. Unlike the conspiracy charges, which allege agreements to commit certain offenses, the substantive counts are based on the actual commission of offenses, or aiding others to actually commit the offenses.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the object of the conspiracy. Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime, even if the object of the conspiracy is not achieved. The essence of the crime of conspiracy is an agreement or undertaking to violate other laws. Thus, if a conspiracy

exists, even if it fails, it is still punishable as a crime. Consequently, in a conspiracy charge, there is no need to prove that the crime that was the object of the conspiracy was actually committed.

By contrast, the substantive counts require proof that the crime charged was actually committed, but do not require proof of an agreement. Of course, if a defendant both participates in a conspiracy to commit a crime and then actually commits that crime, that defendant may be guilty of both the conspiracy and the substantive crime, as I will instruct you shortly.

We will turn first to the substantive counts, or charges, in the Indictment, which are more convenient to consider before the conspiracy charges.

So let's turn first to the three substantive counts, which are listed as Counts Three through Five of the Indictment. I will turn later to Counts One and Two.

Counts Three, Four and Five each charge certain defendants with a substantive count of the crime of wire fraud. Specifically:

Count Three charges that from at least in or about April 2015 through at least in or about May 2015, Mr. Middendorf participated in a scheme to defraud the PCAOB by misappropriating, embezzling, obtaining, sharing, and using the PCAOB's property in the form of valuable confidential

information and documents concerning planned PCAOB inspections in 2015, and by transmitting such information by email, all in breach of duties of confidentiality owed to the PCAOB by former and current PCAOB employees. Mr. Wada is not charged in Count Three.

Count Four charges that, from at least in or about March 2016 through at least in or about May 2016, Mr. Middendorf and Mr. Wada each participated in a scheme to defraud the PCAOB by misappropriating, embezzling, sharing, obtaining -- misappropriating, embezzling, obtaining, sharing, and using the PCAOB's property in the form of valuable confidential information and documents concerning planned PCAOB inspections in 2016, and by transmitting such information by email and telephone, all in breach of duties of confidentiality owed to the PCAOB by former and current PCAOB employees.

Count Five charges that, from at least in or about January 2017 through at least in or about February of 2017, Mr. Middendorf and Mr. Wada each participated in a scheme to defraud the PCAOB by misappropriating, embezzling, obtaining, sharing, and using the PCAOB's property in the form of valuable confidential information and documents concerning planned PCAOB inspections in 2017, and by transmitting such information by email and telephone, all in breach of duties of confidentiality owed to the PCAOB by former and current PCAOB employees.

Counts Three through Five of the Indictment charge

violation of Title 18, United States Code, Section 1343, which provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be [guilty of a crime]."

(Continued on next page)

Turning to the elements of Counts Three through Five, in order to meet its burden of proof, the government must establish beyond a reasonable doubt the following elements of the crime of wire fraud:

First, that there was a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses, representations, or promises;

Second, that the defendant you are considering knowingly and willfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud;

Third, that in execution of that scheme the defendant you are considering used or caused the use of interstate wires.

I will discuss each in turn.

As to the first element, a scheme or artifice is merely the plan for the accomplishment of an object. A scheme to defraud is any plan, device, or action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term that embraces all the various means that human ingenuity can devise and that are resorted to by an individual to gain advantage over another by false representations, suggestions, or suppression of the truth or deliberate disregard for the truth. Thus, a scheme to

defraud is a plan to deprive another of money or property by trick, deceit, deception, or swindle.

The government alleges that there was a scheme to misappropriate, embezzle, obtain, share, and use the PCAOB's confidential information concerning inspections. The words "misappropriate" and "embezzle" are synonyms for these purposes and mean the fraudulent appropriation of property by a person to whom such property has been entrusted.

A person commits embezzlement when he, with the intent to defraud, converts to his own use property belonging to another where the property initially lawfully came within his possession or control. In the context of a criminal scheme to defraud, the words "obtain," "share," and "use" likewise mean to do those things fraudulently, that is, willfully and with the intent to defraud, which I will define for you in a moment.

A scheme to defraud must have money or property as its object. You are instructed that the definition of "property" for purposes of the wire fraud statute includes an organization's or an entities's confidential information that is of value to that organization or entity. In this case the indictment alleges that certain PCAOB information and documents concerning planned PCAOB inspections constituted such property.

Information is confidential if at the time it was subject to a scheme to defraud, the information was both considered and treated by an entity in a way that maintained

the entity's exclusive right to the information. The entity must both consider the information to be confidential and take affirmative steps to treat the information as confidential and maintain exclusivity.

Factors that you may consider in determining whether the PCAOB treated the information at issue as confidential include but are not limited to written policies, employee training, measures taken to guard the information's secrecy, the extent to which the information is known outside the organization, and the ways in which employees may access and use the information.

Now I will say a little more about what it means for a person to embezzle confidential information.

A person is entrusted with confidential information when he is expected to keep the information confidential or at least that the relationship between the person and the owner of the information implies such a duty. The person entrusted with the information embezzles information from the owner only if he deceives the owner about his intent to violate his duty of trust and confidentiality by not disclosing to the owner that he intends to use the confidential information for his own personal gain.

Whether or not the scheme actually succeeded is really not the question. You may consider whether it succeeded in determining whether the scheme existed.

A scheme to defraud need not be shown by direct evidence but may be established by all of the circumstances and facts in the case.

There is one more thing I must tell you about schemes to defraud. If you find that a scheme to defraud the PCAOB existed, it is irrelevant whether the PCAOB inspection process was onerous or whether the PCAOB was a difficult regulator. However, the actions of the PCAOB as well as defendants' opinions of the organization may be relevant to the respective defendant's state of mind and intent, which the Court now turns to.

As to the second element of wire fraud, the government must establish beyond a reasonable doubt that the defendants devised or participate in the fraudulent scheme knowingly, willfully, and with the specific intent to defraud.

To devise a scheme to defraud is to concoct or plan it. To participate in a scheme to defraud means to associate oneself with a scheme while it is ongoing with a view and intent toward making it succeed. While a mere onlooker is not a participant in a scheme to defraud, it is not necessary that a participant be someone who personally and visibly executes the scheme to defraud.

In order to satisfy this element, it is not necessary for the government to establish that the defendant you are considering originated the scheme to defraud. It is sufficient

if you find that a scheme to defraud existed even if originated by another and that the defendant, while aware of the scheme's existence, knowingly participated in it.

It is also not required that the defendant you are considering participated in or had knowledge of the all of the operations of the scheme. The guilt of the defendant is not covered by the extent of his participation.

It also is not necessary that the defendant you are considering participated in the illegal scheme from the beginning. A person who comes in at a later point with knowledge of the scheme's general operation, although not necessarily all of its details, and intentionally acts in a way to further the unlawful goals becomes a member of the scheme and is legally responsible for all that may have been done in the past in furtherance of the criminal objective and all that is done thereafter.

Even if the defendant participated in the scheme to a lesser degree than others, he is nevertheless equally guilty so long as that defendant became a member of the scheme to defraud with knowledge of its general scope and purpose. As I previously noted, before the defendant may be convicted of the fraud charged here, he must also be shown to have acted knowingly and willfully and with a specific intent to defraud.

A person acts knowingly when he acts voluntarily and deliberately and not because of ignorance, mistake, accident,

or carelessness. To act willfully means to act voluntarily and with a wrongful purpose. "Intent to defraud" means to act knowingly and with the specific intent to deceive for the purpose of causing some financial or property loss to another.

The question of whether a person acted knowingly, willfully, and with intent to defraud is a question of fact for you to determine like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge of criminal intent, though subjective, may be established by circumstantial evidence based upon a person's outward manifestations, his words, his conduct, his acts, and all of the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

Now, evidence has been admitted relating to PCAOB bylaws and ethics rules governing the conduct of PCAOB

employees. Whether a PCAOB employee complied with the PCAOB's bylaws and ethics rules is not determinative of the innocence or guilt of any defendant in this case. Nor does a purposeful violation of a workplace rule standing alone mean that the defendant acted with the requisite criminal intent.

As a practical matter, then, in order to sustain the charges against the defendant you are considering, the government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive as opposed to merely transgressing ethical standards and workplace rules and nonetheless that he associated himself with the alleged fraudulent scheme.

The third and final element that the government must establish beyond a reasonable doubt is the use of an interstate wire communication in furtherance of the scheme to defraud. Wire communications include telephone calls, emails, and text messages. The wire communication must pass between two or more states: for example, a telephone call or an email between two states.

The use of the wires need not itself be a fraudulent representation. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant you are considering to be directly or personally involved in the wire communication as long as the communication was reasonably foreseeable in the execution of the alleged

scheme to defraud in which that defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant you are considering caused the wires to be used by others. This does not mean that that defendant must specifically have authorized others to, for example, make a call or send an email. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires can reasonably be foreseen, even though not actually intended, then he causes the wires to be use.

The jury must unanimously agree that at least one such wire communication in furtherance of a scheme to defraud was proven by the government beyond a reasonable doubt.

With respect to these substantive counts, that is, Counts Three through Five, I have stated what the elements are. Each of those counts also charges the respective defendants with violating 18 U.S.C. section 2, the aiding and abetting statute. That is, each defendant is charged not only as a principal who committed the crime but also as an aider and abettor.

Aiding and abetting is set forth in section 2(a) of the statute. That section reads in part as follows. "Whoever commits an offense against the United States or aids or abets

or counsels, commands, or induces or procures its commission is punishable as a principal."

Under the aiding and abetting statute it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order to for you to find the defendant guilty. Thus, even if you do not find beyond a reasonable doubt that the defendant you are considering himself committed the crime charged, you may under certain circumstances still find the defendant guilty of that crime as an aider or abettor.

A person who aids or abets another person of an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find the defendant guilty of the substantive crime if you find beyond a reasonable doubt that the government has proved that another person actually committed the crime and that the defendant aided and abetted that person in the commission of the crime.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it

is necessary that a defendant act willfully, knowingly, and with the intent to defraud to associate himself in some way with the crime and seek by some act to help make the crime succeed. Participation in a crime is willful if action is taken voluntarily and intentionally or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done, that is to say, with an improper purpose.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

Furthermore, a person cannot be found guilty of aiding and abetting a crime that has already been committed. In order to be an aider or abettor, a person must knowingly, willfully, and with intent to defraud associate with the scheme to defraud while the scheme was ongoing. If the wire fraud scheme you are considering for a particular count was already complete by the time the defendant you are considering was made aware of it, you cannot find that defendant guilty as an aider and abettor

To determine whether the defendant aided and abetted the commission of the crime with which he is charged, ask

yourself these questions. Did he participate in the crime charged as something he wished to bring about? Did he associate himself with the criminal venture knowingly and willfully? Did he seek by his actions to make the criminal venture succeed? If he did, then the defendant you are considering is an aider and abettor and is therefore guilty of the offense. If he did not, then the defendant is not an aider and abettor and is not guilty as an aider and abettor of that offense.

Now that we have discussed the three substantive counts in the indictment, let us turn to the conspiracy counts. Count Two of the indictment charges the defendants David Middendorf and Jeffrey Wada with conspiring and agreeing with others to commit wire fraud between in or about April 2015 to in or about February 2017.

A conspiracy is a kind of criminal partnership. It is an agreement of two or more persons to join together to accomplish some unlawful purpose. As I explained earlier, the crime of conspiracy or agreement to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal laws, which the law refers to as substantive crimes. Indeed, you may find the respective defendants guilty of the crime of conspiracy even if you find that the substantive crimes that were the objects or goals of the charged conspiracy were never actually committed.

Count Two.

To sustain its burden of proof with respect to Count Two of the indictment, the government must prove beyond a reasonable doubt the following two elements:

First, the existence of the conspiracy charged in Count Two of the indictment, that is, the existence of any agreement or understanding to commit the unlawful object of the charged conspiracy;

Second, that the defendant you are considering knowingly and willfully became a member of that alleged conspiracy during the applicable time period.

The object of a conspiracy is the illegal goal that the co-conspirators seek to achieve. The object of the conspiracy charged in Count Two is to commit wire fraud. I have previously explained to you the elements of the substantive offense of wire fraud.

Now let us consider the first element of the conspiracy charge. The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered into the unlawful agreement charged in Count Two of the indictment. That count alleges that defendants David Middendorf and Jeffrey Wada conspired with others to commit wire fraud.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy

met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated in words or writing what the scheme was, its object or purpose, or every precise detail of the scheme, or the means by which its purpose or object was to be accomplished.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more persons to cooperate with each other to accomplish an unlawful act. You may, of course, find that the existence of an agreement to disobey or disregard the law as charged in Count Two of the indictment has been established by direct proof. However, since conspiracy is by its very nature is characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard you may, in determining whether an unlawful agreement existed here, consider the actions and statements of all of those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

You will recall that I have admitted into evidence against the defendants the acts and statements of others because these acts and statements were committed by persons

who, the government charges, were also co-conspirators of the defendants on trial. The reason for allowing this evidence to be received against the defendants has to do with the nature of the crime of conspiracy.

A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy.

Accordingly, the reasonably foreseeable acts, declarations, statements, and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy are deemed under the law to be the acts of all of the members, and all the members are responsible for such acts, declarations, statements, and omissions.

If you find beyond a reasonable doubt that the respective defendants were members of the conspiracy charged in the indictment, then any acts done or statements made in furtherance of the conspiracy by persons also found by you to be members of the conspiracy may be considered against that defendant. This is so even if such acts were done and statements were made in the defendant's absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the issue of a defendant's

guilt, you must first determine that the acts and statements were made during the existence and in furtherance of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, they may be considered by you as evidence only against the member who did or said them.

If you find that the government has proven beyond a reasonable doubt that the conspiracy charged in Count Two of the indictment existed, then you must consider the second element of the crime. The second element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the respective defendants knowingly, willfully, and voluntarily became a member of the alleged conspiracy.

I have already instructed you on the definitions of "knowingly" and "willfully," and you should apply those definitions here.

In deciding whether the defendant you are considering was in fact a member of the conspiracy, you must consider whether the defendant knowingly and willfully joined the conspiracy intending to advance or achieve its goals. Did he participate in the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its objective?

It is important for you to note that the respective defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements as well as those of the other alleged co-conspirators and the reasonable inferences which may be drawn from them.

A defendant's knowledge is a matter of inference from the facts proved. In that connection I instruct you that to become a member of the conspiracy, the defendant you are considering need not have known the identities of each and every other member, nor need he have been apprised of all of their activities. Moreover, defendant you are considering need not have been fully informed as to all the details or the scope of the conspiracy in order to justify an inference of knowledge on his part. The defendant must, however, have agreed to participate in the conspiracy charged with knowledge of its object.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

I would caution you, however, that a defendant's mere presence at the scene of the alleged crime does not by itself make him a member of the alleged conspiracy. Similarly, mere association with one or more members of the alleged conspiracy does not automatically make any defendant a member. A person may know, supervise, work for or with, or be friendly with a member of a conspiracy without being a conspirator himself. Mere similarity of conduct or the fact that individuals may have worked together and discussed common aims and interests does not make them members of a conspiracy.

I also want to caution you that mere knowledge or acquiescence without participation in the unlawful plan does not make a defendant a member of the conspiracy. Moreover, the fact that the acts of a defendant without knowledge merely happen to further the purposes or objectives of a conspiracy does not make him a member of the conspiracy. More is required under the law. What is necessary is that the defendant must have participated with knowledge of the purpose or objective of the conspiracy and with the specific intention of aiding in the accomplishment of that unlawful end.

The government is not required to prove that the members of the alleged conspiracy were successful in achieving the object of the conspiracy.

We turn now to the final count in the indictment, Count One. Count One charges Mr. Middendorf and Mr. Wada with

conspiracy to defraud the United States or an agency thereof. The relevant statute covering this charge is section 371 of Title 18 of the United States Code. That section provides as follows:

"If two or more persons conspire to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of a crime."

Count One charges the defendants with participating in a conspiracy with the following object: to defraud an agency of the United States, the SEC. The indictment alleges that in or about April 2015 to in or about February 2017, the defendants and other individuals conspired and agreed together to defraud the United States and the SEC.

The indictment charges defendants and their alleged co-conspirators with employing deceit, craft, trickery, and dishonest means to impede, impair, defeat, and obstruct a lawful function of the SEC. The indictment also alleges in Count One several overt acts that are alleged to have been committed in furtherance of the conspiracy, which I will describe for you later.

As I instructed you earlier, conspiracy is a kind of criminal partnership, an agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy, or agreement, to defraud the United States as

charged in this indictment is an independent offense.

In order to sustain its burden of proof with respect to conspiracy charged in Count One, the government must prove beyond a reasonable doubt each of the following three elements.

First, the government must prove beyond a reasonable doubt the existence of the conspiracy charged in Count One, that is, an agreement or understanding between two or more persons to defraud the SEC. Therefore, the first question for you in Count One is did the conspiracy alleged in Count One exist.

Second, the government must prove beyond a reasonable doubt that the defendant you are considering knowingly and willfully became a member of the conspiracy, that is, that he knowingly associated himself with and participated in the alleged conspiracy with intent to further its unlawful objectives.

Third, as to Count One the government must prove beyond a reasonable doubt that at least one of the members of the conspiracy committed at least one overt act in furtherance of the conspiracy.

I have already instructed you on the first two elements, and you should apply those instructions here. As to the third element, the government must prove beyond a reasonable doubt that some member of the conspiracy knowingly and willfully committed at least one overt act in furtherance

of the objective of the conspiracy and that this overt act was performed during the existence or life of the conspiracy and was done to somehow further the goal of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the members of the conspiracy that furthers the objectives of the conspiracy. An overt act may itself be a lawful act; however, the act must be a step in achieving the conspiratorial objectives.

The indictment alleges the following overt acts.

A. In or about May 2015 Thomas Whittle sent an email from KPMG's Manhattan office soliciting confidential PCAOB information concerning which of KPMG's engagements would be subject to inspection by the PCAOB in 2015.

B. In or about June 2015 David Britt sent an email from KPMG's Manhattan office soliciting confidential PCAOB information concerning which of KPMG's engagements would be subject to inspection by the PCAOB in 2015.

C. In or about March 2016 Jeffrey Wada called Cynthia Holder and provided confidential PCAOB information concerning the identity of certain KPMG engagements that would be subject to inspection by the PCAOB in 2016.

D. On or about March 28, 2016, during the documentation period for most of the engagements at issue, David Middendorf, Thomas Whittle, David Britt, and others

participated in a conference call in KPMG's Manhattan office during which they discussed the utilization of valuable confidential PCAOB information concerning the identity of certain of KPMG's engagements that would be inspected by the PCAOB in 2016.

E. On or about March 28, 2016, David Britt sent an email from KPMG's Manhattan office directing that access be given to various audit files in order to allow secret re-reviews to occur.

F. In or about January 2017 Jeffrey Wada and Cynthia Holder spoke on the telephone, during which conversation Mr. Wada shared valuable confidential PCAOB information concerning the identity of KPMG's engagements that would likely be subject to inspection by the PCAOB in 2017.

G. In or about February 2017 Jeffrey Wada and Cynthia Holder spoke on the telephone, during which conversation Mr. Wada shared valuable confidential PCAOB information concerning the identity of certain of KPMG's engagements that would be subject to inspection by the PCAOB in 2017.

H. In or about February 2017 David Middendorf, Thomas Whittle, and others participated in a conference call in KPMG's Manhattan office during which they acquired and discussed the utilization of valuable confidential PCAOB information concerning the identity of certain of KPMG's engagements that would be subject to inspection by the PCAOB in 2017.

In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the indictment or even any of the overt acts contained in the indictment be proven. However, you must unanimously agree that the same overt act was committed.

Similarly, you need not find that Mr. Middendorf or Mr. Wada committed the overt act. It is sufficient for the government to show that one of the alleged conspirators other than the defendant you are considering knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes in the eyes of the law the act of all of the members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. The sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated.

Now I will instruct you on the object of the charged conspiracy in Count One.

The objects of a conspiracy are the illegal goals the co-conspirators agree or hope to achieve. The indictment here charges that the conspiracy alleged in Count One had one object: defrauding the SEC. You must find beyond a reasonable doubt that this object was proven.

Specifically, the indictment charges that the

defendants and others, known and unknown, willfully and knowingly, using deceit, draft, trickery, and dishonest means, impeded, impaired, defeated, and obstructed a lawful function of the SEC.

A conspiracy to defraud the United States need not necessarily involve cheating the government out of money or property. The statute also includes conspiracies to interfere with or obstruct any lawful government function by fraud, deceit, or any dishonest means. I instruct you that the SEC is an agency of the United States government.

The term "conspiracy to defraud the United States" in this indictment therefore means that the defendants and their alleged co-conspirators are accused of conspiring to impede, impair, obstruct, or defeat by fraudulent or dishonest means the lawful regulatory and enforcement functions of the SEC.

Dishonestly obstructing the lawful function of a government agency must be a purpose of the conspiracy, not merely a foreseeable consequence of it. However, defrauding the SEC need not be the defendant's sole or even primary purpose so long as it is a purpose of the scheme. The intent to defraud the SEC may be incidental to another primary motivation or purpose. All that is required is that an object of the conspiracy was to interfere with or obstruct one of the SEC's lawful government functions by deceit, craft, or trickery or by means that are dishonest.

Count One does not require proof that the defendants intended to directly commit the fraud themselves. Proof that the defendant intended to use a third party as a go-between may be sufficient. But the government must prove that the United States or one of its agencies or departments was the ultimate target of the conspiracy that the defendants intended to defraud.

I have instructed you that the SEC is an agency of the United States. But I instruct you now that the PCAOB is not an agency of the United States or part of the United States government.

With respect to Count One, the government must prove that the defendants intended to defraud the SEC as the ultimate target of the conspiracy. Fraudulent conduct directed solely at a third party, here the PCAOB, is not a fraud against the United States. Therefore, if you conclude that the government has proven that the only target of the conspiracy was the PCAOB and not also the SEC, then you must find the defendants not guilty as to Count One.

In addition, only conduct that both is intended to impede the lawful functions of a government agency and is fraudulent or dishonest will support a charge of conspiracy to defraud a government agency.

A conspiracy to impede the functions of a government agency by fraudulent or dishonest means may include such things

as altering documents after they have been demanded by the government agency, creating false documents, destroying records, making false statements, attempting to induce others to make false statements, or engaging in any other fraudulent or deceptive conduct that would have the effect of impairing the ability of the government agency to determine material aspects of a transaction.

By citing these examples, I certainly do not mean to suggest that these are the only actions that could impede the SEC by fraudulent or dishonest means, nor do I express any view as to whether conduct similar to these examples took place here.

Not all conduct that impedes the lawful functions of a government agency is illegal. To be unlawful, such conduct must entail fraud, deceit, or other dishonest means. Thus, it is not illegal simply to make the SEC's job harder. Only an agreement to engage in conduct that impedes the SEC and also involves fraudulent, deceitful, or dishonest means constitutes an illegal agreement to defraud the United States.

It is not necessary that the government or the SEC actually suffer a financial loss from the scheme or that the scheme violated any separate law. A conspiracy to defraud exists when there is an agreement to impede, impair, obstruct, or defeat in any fraudulent or dishonest manner the lawful functions of the SEC.

Where, however, there is an agreement to impede, impair, obstruct, or defeat the lawful functions of the SEC by fraudulent, deceptive, or dishonest means, the first element is satisfied regardless of whether the means of doing so in that particular instance are or are not unlawful in and of themselves.

In sum, if you find the government proved beyond a reasonable doubt that the charged conspiracy to defraud the SEC existed, that the defendants you are considering joined it, and that with respect to Count One only at least one overt act was committed in furtherance of the conspiracy, then you should find the defendant you are considering guilty as to that count. On the other hand, if you find that the government has not proved beyond a reasonable doubt any of those essential elements, then you must find the defendant you are considering not guilty.

In considering the various charges alleged in this case, you must consider whether Mr. Middendorf and Mr. Wada acted in good faith. The defendants maintain that they acted in good faith at all times.

Good faith is a complete and absolute defense to each of the charges in this case. If the defendant you are considering believed in good faith that he was acting properly, even if he was mistaken in his belief and even if someone was injured as a result of his conduct, there is no crime. An

honest mistake of judgment or negligence is not unlawful intent, and a defendant who acts on such a basis can still be acting in good faith.

The burden of establishing lack of good faith and criminal intent rests on the government. The defendant is under no burden to prove his good faith. Rather, the government must prove beyond a reasonable doubt that a defendant acted in bad faith, i.e., knowingly, willfully, and with the unlawful intent for the charge you are considering. If the evidence in this case leaves you with a reasonable doubt as to whether Mr. Middendorf or Mr. Wada acted in bad faith, you must find him not guilty.

Mr. Middendorf and Mr. Wada deny the government's allegations. Mr. Middendorf maintains that he acted in good faith at all times and without the intent alleged in each count in the indictment. Mr. Wada contends that the government has failed to prove beyond a reasonable doubt that he was the source of the inspection list information obtained by Brian Sweet in 2015, March 2016, January 2017, or February 2017.

Mr. Wada further contends that he was not a member of any agreement to embezzle and misuse confidential information to improve KPMG's inspection results, that there was no such scheme to defraud, and that he did not participate in any such scheme to defraud. As to Count One, Mr. Wada further contends that the government has failed to prove any purpose on his part

directed at impairing or impeding the United States in any way.

That concludes the substantive instructions. I have just a few general instructions now, and then you will go to deliberate.

In addition to dealing with the elements of each of the offenses, you must also consider the issue of venue as to each offense: namely, whether any act in furtherance of unlawful activity occurred within the Southern District of New York. The Southern District of New York includes Manhattan as well as the Bronx, Westchester, Rockland, Putnam, Dutchess, Orange, and Sullivan counties.

For the conspiracy Counts, Counts One and Two, it is sufficient to satisfy the venue requirement if any act by anyone in furtherance of the crime charged occurred within the Southern District of New York. The act itself need not be a criminal act, and the act need not have been taken by the defendant you are considering, so long as the act was part of the crime that you find the defendant you are considering committed.

For the wire fraud counts, it is sufficient if an interstate wire transmission in furtherance of the scheme originated or terminated in this district.

To satisfy this venue requirement only, the government need not meet the burden of proof beyond a reasonable doubt. The government must meet its burden of proof for venue only if

it establishes by a preponderance of the evidence that an act in furtherance of the crime occurred within the Southern District of New York. A preponderance of the evidence means something is more likely than not.

As we have proceeded through the indictment, you noticed that it refers to various dates or times. It does not matter if the indictment provides that specific conduct is alleged to have occurred on or about a certain date, month, or time and the evidence indicates that in fact it was on a different month, date, or time. As I mentioned earlier, the law only requires a substantial similarity between the dates alleged in the indictment and the date established by testimony and exhibits.

You will now retire to decide the case. Again a few high-level instructions.

Your function is to weigh the evidence in the case and to determine the guilt or lack of guilt of the defendants with respect to the charges in the indictment. You must base your verdict solely on the evidence and these instructions as to the law and your obliged under your oath as jurors to follow the law as I instruct you, whether you agree or disagree with the particular law in question.

Your verdict must be unanimous. This means that each and every one of you must agree upon your verdict. Each juror is entitled to his or her opinion, but you are required to

exchange views with your fellow jurors. This is the very essence of jury deliberations. It is your duty to consult with one another and to deliberate with a view to reaching agreement.

If you start with one point of view but after reasoning with other jurors it appears that your own judgment is open to question, then of course you should not hesitate in yielding your original point of view if you are convinced that the opposite point of view is one that truly satisfies your judgment and conscience.

But you are not to surrender a view of the case that you conscientiously believe merely because you are outnumbered or because other jurors appear firmly committed to their views. You should vote with the others only if you are convinced on the evidence, the facts, and the law that it is the correct way to decide the case.

In sum, you the jury must deliberate as a body, but each of you as an individual juror must discuss and weigh your opinions dispassionately and adopt that conclusion which in your good conscience appears to be in accordance with the truth. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

I instruct you that you are not to discuss the case unless all jurors are present. Four or five or ten jurors

together are only a gathering of individuals. Only when all jurors are present do you constitute a jury, and only then may you deliberate.

Remember, at all times you are not participants, you are judges, judges of the facts. Your sole interest is impartially to assess the evidence to determine whether the government has met its burden of proving guilt beyond a reasonable doubt as to each of the charges.

If you are divided, do not report how the vote stands. Simply state that you are divided.

If you have reached a verdict, do not report what it is until you are asked in open court. Simply inform me that you have reached a verdict.

You are about to go into the jury room and begin your deliberations. The exhibits that were received in evidence will be provided to you in the jury room. In addition to paper copies of many of the exhibits, you will be provided with a laptop that contains certain exhibits that could not be presented in hardcopy. You will be given an exhibit list that will explain which exhibits can be accessed on the laptop.

If you want any of the testimony to review, you may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting portions of the testimony.

If you want any further explanation of the law as I

have explained it to you, you may also request that.

Your requests for testimony, in fact any communications with the Court, should be made to me in writing, signed by your foreperson, and given to the marshal or the deputy clerk. In any event, do not tell me or anyone else how the jury stands on any issue until there is a unanimous verdict.

If you took notes during the trial, those notes are only an aid to recollection. They are not evidence, nor are they a substitute for your recollection of the evidence in the case. Your notes are not entitled to any greater weight than your actual recollection or the impression of each juror as to what the evidence actually is.

I emphasize that if you took notes, you should not show your notes to any other juror during your deliberations. They are only for yourself. If you did not take notes during the trial, you should not be influenced by the notes of another juror; instead, you should rely on your own recollection of the evidence. The fact that a particular juror has taken notes does not entitle that particular juror's views to any greater weight.

I have prepared a verdict form for you to use in recording your decision. Please use that form to report your verdict. The verdict form does not represent either evidence or instructions on the law.

At the beginning of your deliberations you must choose a foreperson. The foreperson does not have any more power or authority than any other juror, and his or her vote or opinion does not count for any more than any other juror's vote or opinion. The foreperson is merely a spokesperson to the Court. He or she will send out any notes. And when the jury has reached a verdict, he or she will notify the marshal that the jury has reached a verdict, and you will come into open court to give the verdict.

After you have reached a unanimous verdict, your foreperson will fill in the form that has been given to you, sign and date it, advise the marshal outside the door that you are ready to return to the courtroom. I will stress that each of you must be in agreement with the verdict that is announced in court. Once your verdict is announced in open court and officially recorded, I cannot ordinarily be revoked.

You are remind that you took an oath to render judgment impartially and fairly, without prejudice or sympathy, solely upon the evidence in the case and the applicable law. I'm sure that if you follow your oath, listen to the views of your fellow jurors, and apply your own common sense, you will reach a fair verdict here. Remember that your verdict must be rendered without fear, without favor, and without prejudice or sympathy.

Members of the jury, this concludes my instructions to

you. I'll ask you to remain seated for a minute while I confer with the attorneys to see if there are any additional instructions they would like to have me given to you or anything I have not covered in my previous statement.

(At the sidebar)

MS. KRAMER: We have nothing, your Honor.

MR. COOK: Your Honor page 7, the presumption of innocence instruction, on the first line of the last paragraph of that instruction I believe your Honor read "The presumption of innocence also requires." It should be "alone requires."

THE COURT: Do you want me to clarify that?

MR. COOK: Yes.

THE COURT: Okay. Anything else?

MR. BOXER: I just had a question about the index. Is that the final one that was sitting here?

MS. KRAMER: Is that our final index?

MR. BOXER: Is that the one we intended to send back?

MS. MERMELSTEIN: That's the one the paralegals gave you.

MR. BOXER: We'll look at it a little closer.

MS. KRAMER: If your Honor is giving a clarification, on page 23, the conspiracy instruction that is the second paragraph under the heading B, the sentence in the middle of the paragraph that begins "The essence of the crime of conspiracy is an agreement," I believe your Honor said "or

undertaking" instead of "understanding." If you are giving a clarification, they are going to get the written charge, but we would ask you to include that one.

THE COURT: Okay. Anything else?

MS. KRAMER: We are going to make sure the index is in order, and we will have a cart coming so we have the computer and we can put the exhibits and the computer on that.

MR. WEDDLE: I want to preserve our prior objections and requests as to the instructions.

MR. BOXER: Same, your Honor.

THE COURT: Okay.

(In open court)

THE COURT: As I said earlier, you will have a copy of precisely what I read. Although, as often happens when I try to read a 50-page document, I screw up a few words. There are a couple of points that I think I misread the correct form of what you will have. I am going to highlight and repeat so it is clear what I meant to say and what the correct version is which you will have.

When I was talking about the presumption of innocence, at page 7 of the copy of my instructions, I meant to say this. I might have gotten a word wrong.

This presumption of innocence alone requires you to acquit the defendants unless you as jurors are unanimously convinced beyond a reasonable doubt of their guilt after a

careful and impartial consideration of all evidence in this case. It is removed if and only if as members of the jury you are satisfied that the prosecution has sustained its burden of proving the defendants guilty beyond a reasonable doubt.

Then, when I was discussing the conspiracy counts compared to the substantive counts, which will be on page 23, in the middle of the page I want to clarify the following sentence.

The essence of the crime of conspiracy is an agreement or understanding to violate other laws.

Everything else that I read you will be getting a copy of.

Before you retire into the jury room, I must inform you, and some of you may know this, that the law provides for a jury of 12 people in this case. Three people, Jurors No. 13, 14, and 15, are alternates. You will be allowed to leave the courthouse during the deliberations, but you are not yet excused as jurors. In the event that one of the nonalternate jurors can no longer deliberate, you will be recalled to continue your service.

So, I am releasing you for now but not excusing you from jury service yet. You will not be part of the deliberations, but it is possible that you will be called back if something happens during deliberations with one of the other jurors. We have your contact information. I believe you have

ours as well.

I am going to now not excuse you from jury service but let you go. We will contact you either way, if we need you to come back or, if we don't need you, we will contact you to let you know that the trial is complete. At this time you may gather your things, the three of you. I want to thank you for your attentiveness and service.

I'm sorry. Can you come back for one second. I just wanted to say a couple of more things. I'm sorry that you in all likelihood will miss the experience of deliberating with the jury, but the law provides for a jury of 12 people in the case. Before the rest of the jury retires, if you have anything in the jury room, please pick it up and take it out before the deliberations start.

Also, please do not discuss the case with anyone over the next few days. We will let you know when the jury is done deliberating. At that point you can discuss the case with anyone you want. But I am going to ask that you continue what I said before about not discussing the case, not doing any research on the case, because it is possible that you will have to come back and deliberate. Thank you again.

(Alternate jurors not present)

THE COURT: Now I am going to send you all back to begin deliberations. Given what we talked about in terms of scheduling, I believe the plan was to break at 2 o'clock today

because of some issues. I think we got lunch for you today thinking we might finish earlier, so you can grab a quick by the. We will be sending in all the exhibits.

There won't be any significant time to deliberate today. So, assuming you are in fact breaking at 2 o'clock, you will then come in Monday morning at 9:30 a.m. to begin deliberations.

I want to emphasize what I said, that when there are four, five, six, seven of you, even eleven of you, you are not a jury, you should not be talking about the case. It's just like up until now. You can talk about other things but not the case. Only when all 12 of you are in the jury room, only then may you begin deliberations and only then are you the jury.

We will be, as I said, sending all the evidence back into the jury room on a cart as well as a laptop.

I think that's it. You can go back to deliberate.

JUROR: Your Honor should we leave the books here?

THE COURT: You can now take the notebooks back to you and you can use them in your deliberations. You should not take the notebooks home. Leave them in the jury room.

There is also a marshal who will be sitting outside the jury room door. Is the marshal here to be sworn? Please swear in the marshal.

(Marshal sworn)

THE COURT: Before I send you back to retire, I want

to repeat one more time that your deliberations are in the jury room. When you leave for the weekend and over the weekend, also at night, you should not be doing any research on the case. You should continue not discussing the case with others. You should discuss the case with each other in the form of deliberations only when all 12 of you are present.

You may now retire to the jury room and take your pads with you to begin. Thank you, folks.

(1:40 p.m., the jury commenced deliberations)

(Jury not present)

THE COURT: Here is the cart. Do we have the laptop as well?

MS. KRAMER: Yes, your Honor.

THE COURT: I believe they are going to leave at about 2 o'clock. Mr. Hampton will confirm with everybody when they have left. Starting on Monday morning, if you would all let Mr. Hampton know if, in case there is a note from the jury, you wander beyond the courtroom and its vicinity.

Anything else you wanted to address?

MR. BOXER: No, your Honor.

MS. KRAMER: No, your Honor.

MR. COOK: No, your Honor.

MS. KRAMER: Your Honor, do you want us to stay here until 2 o'clock or are we excused with the understanding that the jury is going to do what they are doing and leave at 2:00?

THE COURT: I think you should probably stay until 2:00 just in case there is a note or something.

MS. KRAMER: Certainly, your Honor, thank you.

THE COURT: There is some chance that they say I canceled my trip, I can stay until five. So stay until 2:00 until you get confirmation from Mr. Hampton that they are leaving.

(Adjourned to March 11, 2019, at 9:30 a.m.)